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No. 245.

By. of McConnell v. Jamieson

Respondents.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 245.

HENRY CLEWS ET AL., *Petitioners,*
vs.
MALCOLM M. JAMIESON ET AL., *Respondents.*

Certiorari to Circuit Court of Appeals, Seventh Circuit.

BRIEF FOR RESPONDENTS, JAMIESON & CO.

SAMUEL P. McCONNELL,
HORACE KENT TENNEY,
M. LESTER COFFEEN,
CHARLES F. HARDING,
JAMES H. WILKERSON,
SOLICITORS FOR SAID RESPONDENTS.

25283

IN THE

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STATEMENT OF THE CASE.

This is one of those cases whose main difficulty lies in separating the ultimate propositions upon which the rights of the parties depend, from the entangling mass of minor facts. Such effort of counsel as is to be of material assistance to the court must, therefore, be directed toward simplifying the statement of the real issues.

THE FACTS RELATING TO THE FORMATION OF THE ALLEGED CONTRACT BETWEEN THE PETITIONERS AND JAMIESON & CO.

The theory of the petitioner's case is that they had a contract with Jamieson & Co. for the sale to the latter of 700 shares of stock, that Jamieson & Co. refused to accept the stock, which was thereupon sold at a loss of $64,400, for which sum a recovery is sought. The claim as thus

stated is plainly a mere legal demand, and the jurisdiction of equity is asserted upon the ground that there is a fund in the hands of the governing committee of the Stock Exchange as security for the performance of the contract, upon which fund the complainants wish the decree for their damages to operate.

It is important to know at the outset the theory of this claim as put forward in the bill: for the complainants are bound by those allegations, and are not permitted to make one case by their pleadings and another by their proofs. Unless the theory of the bill was sustained by the evidence the decree dismissing it was right and could not be reversed.

Turning to the bill we find its statement of the contract on which the suit is based to be as follows:

That Clews & Co. in July, 1896, the day not being stated, directed their brokers, Schwartz, Dupee & Co., to sell for them 700 shares of Diamond Match stock, deliverable on August 31st; that on August 3d the brokers sold on the Stock Exchange *1,150* shares to Jamieson & Co. at $222 per share; that the sale was made in the broker's name, but as to 700 of the shares they were acting for and in behalf of Clews & Co., and as to the other 450 shares were acting for other clients. (*Trans., p.* 55.)

It will be noted that the bill makes no mention of a sale for the July account, and states in unequivocal terms that the order for the sale for the August account was filled by *a sale on August 3d.* There were thus, by the allegations of the bill, only two steps in the formation of this contract, an order to the brokers, and its fulfillment by a sale on August 3d to Jamieson & Co. in which Clews & Co. and some unknown persons were the undisclosed principals.

We call attention here to this direct and simple allegation of the bill because of its wide variance from the elaborate scheme of evidence by which it was sought to be established. The evidence concedes the allegations of the bill to be false. For the sale of 1,150 shares on August 3d was not the sale which the brokers made for Clews & Co., but was, at best, the resultant of two separate sales made for Clews & Co. and a large number of sales made for other persons. And it is only by taking those sales into consideration that we reach the transaction of August 3d at all. And the sales which the brokers made after getting the order, and which they reported to their principals are not counted on or so much as referred to in the bill.

In stating the facts as to those sales we omit, for the present, the sales for the July account, for by the express finding of the master, to which petitioners took no exception, and by the necessary effect of the transaction, the changing over of the July sales to the August account "balanced the sales on July account and left the brokers with sales made for complainants of 700 shares of the stock of the Diamond Match Company for the August account." (*Trans., p.* 37.) And this is the testimony of the petitioner's witness, Mr. Comstock. (*Trans., p.* 105.)

There never was a sale of 700 shares either ordered by Clews & Co. or made for them by Schwartz, Dupee & Co., nor any sale made by the process of substitution in which that number was the subject of the sale. The allegation of the bill that there was either an order or a sale for that number is concededly untrue. The orders which were given and the sales which were made were two entirely separate transactions, on different dates, one on

July 25th of 500 shares and the other on July 27th of 200 shares. Of course these amounts, added together, make 700 shares, but as we are taking up now the facts which relate to the contracts which Clews & Co. authorized and Schwartz, Dupee & Co. are said to have made, it is important to bear in mind that the transactions upon which the petitioners rely did not even start with such a contract as they allege in their bill.

The sale of the 500 shares for the August account on July 25th is shown by the stipulation of facts to have been effected on the exchange by sales to four different parties of amounts aggregating 500. One of these parties was Jamieson & Co., who bought fifty shares, and they were thus parties, but not the only parties, to this initial transaction. (*Trans., p.* 67.) Stopping the transaction at this point, we have four different sales at the same price, Jamieson & Co.'s purchase involving only fifty shares. This transaction is somewhat simplified by the fact that the entire sales by Schwartz, Dupee & Co. on that day for the August account, *were limited to the 500 shares which they sold for Clews & Co.* (*See their statement in the stipulation of facts, p.* 67.) In this respect the 500 share sale on July 25th differs essentially from the 200 share sale on July 27th, the next business day, and this shows the importance of keeping these transactions separate, if we are to have a correct understanding of their ultimate effect in forming a *contract between Clews & Co. and Jamieson & Co. for 700 shares.*

The only sale for the August account made by Schwartz, Dupee & Co. at $299 on July 27th (the date and price of the 200 share sale) is stipulated to have been a single sale of *350* shares to *R. A. Peters.* (*Trans., p.* 70.) And it is said that 200 shares of this amount were sold for

the complainants. (*Trans., p.* 77.) That sale, however, was at once offset by a *purchase* from the same buyer, Peters, *of the same shares at the same price.* And in their clearing house sheet of that day Schwartz, Dupee & Co. *entered these two transactions as cancelling each other, and leaving them liable to deliver only the stock called for by other trades.* (*Trans., p.* 70.)

Stopping this transaction here we see that by the conceded facts Schwartz, Dupee & Co. did not sell 200 shares for Clews & Co., either by making a contract with one broker, for that number, or several contracts with different brokers for shares aggregating that number. They made one sale of 350 shares and canceled it by a counter-purchase at the same price from the same person.

That this 200 share sale was thus extinguished substantially at the time of its inception is also shown by the subsequent dealings of Schwartz, Dupee & Co. with, and through, the clearing house. On their clearing house sheet of that day they entered the balance of their shares sold for the August account as 500, which was the result of two *substituted* transactions from the previous day *at a different price,* $228. (*Trans., p.* 70.) In their sheet for the next day, July 28th, they carried forward these 500 substituted shares, the other entries of that day being new sales to other brokers. (*Trans., p.* 71.) Thus, by their own statements, and by the admitted facts, Schwartz, Dupee & Co., at the end of July 27th, the day when the sale is claimed to have been made and on which it was reported to Clews & Co. as made, which brought the latter's sales up to 700 shares, did not have outstanding contracts *with any one* for more than 500 shares. In other words, the 200 share sale, which is just as essential to the peti-

tioners' case as the 500 sale, never got into the clearing house as an existing contract which was or could be, by the process of substitution, imposed upon Jamieson & Co. or any one else.

That this was the effect of the transaction appears also from the testimony of the petitioners' witness Mr. Wilkins, the chairman of the clearing house, and from the master's finding. Mr. Wilkins having testified that substitutions were made only with members who have stock in the clearing house, said:

> "Every stock that goes in the clearing-house, Diamond Match, take for instance, any man who puts a sheet in to-morrow morning with 100 shares would have to put a certified check in of $1,000; *that is unless his sheet balanced.* If he had 100 shares of stock bought and 100 sold, and simply the difference to draw out or put in, he wouldn't put any margin in *because he wouldn't have any stock in the clearing-house;* but if there *is anything open on his sheet,* he would have to put in a thousand for every hundred shares of stock." (*Trans., p.* 116-7.)

To sum up the application of these facts to the petitioners' case.

The essence of their theory is that *their* sales of 700 shares became, by the workings of the clearing-house, imposed by substitution upon Jamieson & Co. It is of no consequence that *other* sales of Schwartz, Dupee & Co., or trades of their other clients, or trades of other brokers, became ultimately imposed upon Jamieson & Co., so that the latter were bound as purchasers under a valid contract. The petitioners' rights depend upon the fact that *their* contract either alone or with others, ran that course. And this necessarily involved the continued *vitality*—if not the continued *identity*—of the contract which their

agents made in their name. If Schwartz, Dupee & Co. made a sale for Clews & Co., *but did not put it into the clearing-house,* then it obviously did not form any part of the shifting balances out of which was evolved the substitution of 1,150 shares to Jamieson & Co. on August 3d. Or if, having made the sale they extinguished it by a counter-purchase from the same buyer at the same price, and put it on their clearing-house sheet not as an open trade *to be* settled by the clearing-house, but as one which their own transactions had already settled, the same result followed. For in such case there would be nothing on which the substituting machinery of the clearing-house could operate. It was therefore essential that Schwartz, Dupee & Co. at the close of the day on which they made the second sale for petitioners—the one which brought their sales up to 700 shares—or at the opening of the next day, should have sales outstanding *for at least 700 shares,* and should have put those sales into the clearing-house for settlement. If their outstanding sales were less than 700 shares, then clearly those sales could not include 700 shares for Clews & Co.

The conceded fact is that, even after making the 200 share sale, Schwartz, Dupee & Co. had and put in the clearing-house existing contracts for only 500 shares; and that their outstanding sales were not increased beyond that amount until July 28th, the day after their last sale for Clews & Co.—*and then only by new sales for different customers.*

This concrete illustration from the facts relating to the inception of the petitioners' contract shows somewhat more clearly the application of the statements in the stipulation of facts as to the effect of these clearing-house substitutions. The provisions of that stipulation seem to

have been overlooked by counsel for petitioners in formulating their theory of the case.

Their theory is that Clews & Co. as undisclosed principals, are parties to, and can therefore enforce, the contract of sale which their brokers make for them; in other words, that it is a contract in which they are sellers and the other broker, or his principal, is the buyer. Upon this theory the four sales which Schwartz, Dupee & Co. made for them on July 25th to four different brokers, involving in all 500 shares, were in effect so many contracts which Clews & Co. could enforce against the buying brokers, or their principals.

The next part of this theory is that, by the operations of the clearing-house the buyer, the number of shares and the price, changed each day, but the seller always remained the same, and entitled to enforce the contract. Plainly, if the original contract continued in force as to the principals, then those principals were not parties to the so-called substituted contracts which their brokers made; these two things are clearly inconsistent. There could not be in force at the same time both the original contract of sale and one which was substituted for it. Yet that the original contract continued in force *so far as the principals, Clews & Co., were concerned,* is an admitted fact. We quote from the stipulation:

"That the transactions heretofore set out in this stipulation of purchase and sale by Schwartz, Dupee & Co., Jamieson & Co., and the other brokers whose names are stated, with the exception of those transactions which are marked as substitutions, were had by the brokers on behalf of different clients or principals whom they represented, *and those transactions, so far as the different*

principals are concerned, were not settled or canceled by any of the substitutions, nor by any of *the settlements between the brokers,* except so far as where one client or principal of a broker was through such broker, both a purchaser, and a seller. In other words, the settlements by substitutions or otherwise through the clearing-house *were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves,* except where the same broker had both purchased and sold for the same client." (*Trans., p.* 78.)

Applying the facts thus admitted to the specific sales upon which petitioners' entire case is based, we have this conceded result:

On July 25, 1896, Clews & Co. made through their brokers, Schwartz, Dupee & Co., four contracts of sale at the price of $229, with the following named brokers, viz.:

50 shares	Jamieson & Co.
50 shares	King, Alward & Co.
100 shares	Wilson & Sturges.
300 shares	Wm. G. Wasmansdorf.
500	

(*Trans., p.* 67.)

On July 27th they included a sale of 200 shares at $229 in an entire contract with R. A. Peters for 350 shares. (*Trans., p.* 67.) [We state the fact in this way, and leave out the purchase back of this stock from Peters on the same day, so as to put the transaction in its strongest form for petitioners.]

These contracts, by the express language of the stipu-

lation, were not, so far as the principals on either sid
were concerned, settled or canceled by any of the substi
tutions, or the settlements between the brokers; they wer
"merely settled between the members of the Stock Ex
change," and not between the principals whom they rep
resented, or between them and the principals on eithe
side. Notwithstanding the substitutions Clews & Co. had
not only on August 3rd, but on August 31st, enforceabl
contracts with each one of the purchasing brokers an
their principals for the number of shares which they ha
bought. And, reciprocally, each of those brokers, an
their respective principals, could enforce against Clews &
Co. the obligation to delvier the stock according to th
original terms of a contract, whose binding force is con
ceded to have remained unimpaired by the subsequen
events.

The exact contrary of these admitted facts is stated b
petitioners' counsel in their brief and made the basis o
their entire argument. The statement in their brief is a
follows:

"9. So that when the contract of July 25th, at $22
per share, through these daily novations and substitutions
had merged into the contract of August 3rd at $222 pe
share, *all prior contracts had been canceled* and *annulled*
that Jamieson & Co., representing as it now appears, J. H
& W. H. Moore, had then agreed to purchase the 70
shares of stock sold by Henry Clews & Co. throug
their brokers, Schwartz, Dupee & Co., and receive an
pay for them on the 31st day of August $222 per share."
(*Brief, p.* 24.)

They thus proceed upon the theory that the origina
contract of sale made by Clews & Co. as undisclosed prin
cipals was canceled by the substitutions, and this, th

foundation of their argument, is destroyed by their stipulation of facts.

This stipulation, it will be noted, was made as one of the terms upon which petitioners were permitted to amend their bill, after the evidence was closed and the master had filed his report. The evidence did not support the allegations of the original bill, and this amendment was a necessary one. The original bill alleged that they directed Schwartz, Dupee & Co. to sell 700 shares for delivery on August 31st, and that they filled the order by selling *700* shares on August 3d. (*Trans., p.* 3.) That the transaction of August 3d, whether treated as an original or a substituted sale, was for 1,150 and not 700 shares, was of course shown when the evidence was taken. They therefore amended their bill by abandoning the allegation that their brokers made for them on August 3d a contract for the delivery of 700 shares, and alleged that the contract was for 1,150 shares, and that the brokers were acting for them as to 700 shares, and for other parties as to the other 450 shares. (*Trans., p.* 55.) The answer of Jamieson & Co. to this amended bill denied that on August 3d Schwartz, Dupee & Co. sold them any stock *as agents for complainants;* alleging that the substitution of 1,150 shares by the clearing-house on that day did not substitute them as purchasers in any contract made by Schwartz, Dupee & Co. as agents for complainants, but was a mere settlement between the brokers for their own convenience, and without affecting in any way the rights or liabilities of the principals whom said brokers represented, and for whom they had made such purchases and sales." (*Trans., p.* 61.)

These allegations of the answer are stipulated to be

true. The case then on the bare record is reduced to this:

1. The complainants allege in their bill a sale made by their brokers to defendants on August 3d of 1,150 shares, of which 700 were sold for them, stating it as an original transaction and saying nothing about prior transactions or substitutions.

2. The defendants deny making such a contract.

3. The complainants seek to prove the allegation by showing that prior contracts were made and that this new contract was substituted for those, and canceled them.

4. The defendants allege that those prior contracts were with other parties, that they have not been canceled, and still bind the parties to them, including the complainants.

5. The complainants, their brokers, Schwartz, Dupee & Co., and the governing committee of the Stock Exchange, join with Jamieson & Co. in stipulating that this is true.

THE RULES OF THE STOCK EXCHANGE WITH REFERENCE TO ENFORCING AND ASCERTAINING THE DAMAGES ON DEFAULTED CONTRACTS.

THE FACTS CONNECTED WITH THE FICTITIOUS SALE MADE BY THE PETITIONERS FOR THE PURPOSE OF FIXING THEIR DAMAGES.

In addition to the legal obligation of the seller to make a tender of the property the rule of the Exchange required such tender and fixed the hours for delivery. (*Rule VII.; Trans., p.* 32.) In this case the tender was made by Schwartz, Dupee & Co. of 1,150 shares, and no tender was ever made of 700 shares, even after Schwartz, Dupee

& Co. had, about ten days subsequent to the delivery day, informed Jamieson & Co. that Clews & Co. were interested to that extent. The shares which were tendered did not, nor did any part of them, belong to the petitioners. (*Trans., p.* 137.)

The rules of the Exchange with reference to the closing and enforcement of defaulted contracts and the notice required for that purpose were as follows:

ARTICLE VII.

Hour for Delivery of Securities—Payments.

"Section 1. All deliveries of securities must be made between 11 A. M. and 1:30 o'clock P. M., or the buyer may demand that they shall lie over until the next day without interest, when they shall be delivered before 10:30 o'clock A. M., *and when deliveries are not made by that time the contract may be closed under the rule after due notice to the defaulting party as provided in Article XVII. of the by-laws.* Such notice must be given, however, not later than 10:45 o'clock A. M., and the contract must be closed without delay unless the time for so doing be extended by mutual consent. In all cases certified checks on national or state banks must be given in payment of all securities delivered.

ARTICLE XVII.

Default—Closing Contracts Under the Rule.

Should any member neglect to fulfill his contract on the day it becomes due, the party or parties contracting with him shall, *after giving notice as required by section 2 of the preceding article, employ any officer of the board to close the same forthwith in the Exchange by purchase or sale as the case may require,* unless the price of settlement has been agreed upon by the contracting parties. *In case*

of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such contract ought to have been closed under the rule. In all cases where an officer may be directed to buy or sell securities under this rule, the name of the member defaulting, as well as that of the member giving the order shall be announced. No order for the purchase or sale of securities under this rule shall be executed unless made out in writing over the signature of the party giving the order, who shall state the reason therefor, and it shall be the duty of the officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the secretary of the board, who shall, within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction; if not, the secretary shall report the default to the president. The duty devolved upon the officers of the Exchange, under this rule, shall be performed without charge. *No party shall be permitted to supply offers to buy or sell securities closed for his account under the rule;* and when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, in the discretion of the governing committee, by a two-thirds vote of the members present at the meeting. When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this article. Should any stock thus sold not be

delivered until the next day, the contract shall continue, but the defaulting party shall be liable to pay such damage as may be assessed by the arbitration committee. The same rules as to notice, time and place, that govern defaults in other contracts, shall apply to borrowed securities, which, on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering after notice, to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter in the manner provided in this article."

The provision in the preceding section (XVI.) as to notice which is referred to in this rule was as follows:

"The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified, or in case he has no office, then by public announcement whenever the Exchange may be in session."

Section 2 of Article XXVIII. clearing-house rules provides as follows:

"Deliveries of cash, stock or transactions for 'the account' shall be made on the last day of each month. Provided, however, that should the last day of any month occur on a holiday, *or on a day when the Exchange is closed for business,* then in that case deliveries shall be made on the *first business day preceding.*" (*Trans., p.* 34.)

This theory of the petitioners' case is based upon the proposition that the rules of the Stock Exchange form part of their contract. That contract is therefore to be taken as having the following special provisions with reference to the action of the parties, and their rights in case of default:

1. The seller should, after giving notice, request in writing, an officer of the board to sell the stock on the Exchange, and thus determine the market price.

2. If this was not done the price should be fixed by the price current at the time the contract ought to have been closed under the rule.

We shall discuss in another part of this brief the question of the construction of these provisions of the contract: whether the "price current" means the price when sales are made on the exchange, or the market price without reference to the place of sale; whether, the Exchange being closed under the rule, the price current on the last business day when it was open is to govern; and whether, if a sale is made for the purpose of fixing the price, it can be made on the street by one who is not an officer or even a member of the Exchange, but an outsider. At present we are simply showing the facts with reference to the provisions of the contract, and the acts of the parties under it.

There was no attempt to comply with any of these provisions of the contract; no effort made to get an officer to make the sale either on the Exchange or elsewhere, no evidence offered as to either the market value or the "price current" on August 31st. The bill makes no allusion to these rules or provisions of the contract, or to the closing of the Exchange, and thus does not proceed upon the theory that the petitioners were prevented from complying with them, but upon the theory of performance of all that the contract called for. The rules are set up in the answer as forming part of the contract, and they are admitted.

The sale which was pleaded in the bill and upon which

petitioners rely as fixing the amount of their damages, was made on September 22nd, and the notice was served on September 10th. The sale and the notice, though purporting to be based upon a contract for 1,150 shares, covered only 700 shares. In the face of the rule which specifically provided that "no party shall be permitted to supply offers to buy or sell securities closed for his account under the rule"; and that "no fictitious sales shall be made" (*Trans., pp.* 31, 33), Clews & Co. not only supplied a buyer, but a fictitious one, and went through the form of selling the stock to him. They arranged with Mr. Gage, one of the defendants in this case, to act as ostensible buyer (*Trans., p.* 45), gave him instructions as to the amount of his bid, authorizing him to bid up to $135, and the bid which he made *was not even as high as his instructions warranted.* (*Trans., pp.* 132-3.) A responsible *bona fide* bidder offered $135 per share for 200 shares, but this bid was rejected unless he would furnish a bid for the balance of the 700 shares. (*Trans., p.* 129.) As Clews & Co. had their own bidder there with instructions to bid up to $135 if necessary, this was plainly a mere pretense, and a method of enhancing the apparent damage which they hoped to collect from Jamieson & Co. If their pre-arranged bidder had bid for the remaining 500 shares only the $130 per share which he had already offered, it would have made a difference of $1,000 in favor of Jamieson & Co.

The conceded facts about this sale show that it was a mere fictitious transaction.

1. Neither the 1,150 shares which were tendered to Jamieson & Co. on August 31st nor the 700 which were sold on September 22d belonged to Clews & Co. They were brought by Mr. Conley of Schwartz, Dupee & Co.

for the purpose of having them present at the sale, but with the understanding with the attorney of Clews & Co. that "if the purchaser at this auction sale should take this stock which Schwartz, Dupee & Co. had furnished for the purpose of this sale, then Clews & Co. were to substitute their stock of a like amount in place of the stock sold." In other words, if there was no sale they were not to part with even the temporary possession of the shares.

2. Mr. Gage, the ostensible purchaser, was employed to bid by Mr. Waggoner, the agent of Clews & Co. The stock was not delivered either to him or to Waggoner, nor did he pay, either to the complainants, Schwartz, Dupee & Co., or any one else, the pretended purchase price. On the contrary, Mr. Comstock, the stock clerk of Schwartz, Dupee & Co., testifies that the stock was "all the time the property of Schwartz, Dupee & Co., and in their possession both before and after the sale." (*Trans., pp.* 137-8.)

3. This fictitious sale was to be the basis of a suit against Jamieson & Co. and therefore the parties went through the form of making documents which would give an appearance of reality to it. The attorney of Clews & Co. gave to Gage a memorandum "sold to Frank N. Gage 700 shares of Diamond Match stock numbered A680-686, inclusive, at $130 per share." Mr. Gage thereupon wrote on this an order—not addressed to anyone—to deliver the stock to Mr. Waggoner and accept his check in settlement; the memorandum with this endorsement was *then delivered back to the attorney for Clews & Co.* and he delivered it to Mr. Waggoner, with an order on Schwartz, Dupee & Co. to deliver the stock to him, on payment of $130 per share. (*Trans., pp.*

137-8.) And there the transaction stopped; the order was never presented, the money was never paid, the stock was never delivered, and the title, which was ostensibly divested by a sale, as well as the possession, remained where it was when the performance began.

THE POSITION OF THE GOVERNING COMMITTEE OF THE STOCK EXCHANGE IN THIS CASE.

When the application for a *certiorari* was made in this case and after our brief in opposition had been filed, a brief was filed on behalf of the Governing Committee of the Stock Exchange in which the court was requested to grant the writ. The case, upon that application, was thus presented as one in which parties on opposite sides of the record united in seeking a review of the decisions of the lower courts. In this brief it is stated that the defendants upon whose behalf it is filed have no interest in the litigation, and appear only for the purpose of procuring from this court a decision which will be of benefit to them in future transactions. The two questions to which this effort are directed are the question of the legality of the contract, and the question whether Clews & Co. were parties to the contract of August 3d between Schwartz, Dupee & Co. and Jamieson & Co. The first of these questions is said to be of interest to the Stock Exchange, as a legal proposition, because trading in the manner which the Court of Appeals condemned is necessary to its prosperity, if not to its existence. Its interest in the question whether the principals in contracts made by its members are *parties* to new agreements made between the members is of an even more abstract character. For its liabilities are not affected in any way by that question, and the decisions of both the lower courts have proceeded

upon the theory that the substitutions through the clearing-house accomplish their purpose and create new contracts between the brokers. Why the Exchange is interested in affirmatively establishing the legal proposition that its members are liable on those contracts not only to the other members, but to outsiders, we have not discovered, and it is perhaps immaterial that we have not.

The other question in this case is whether when the Governing Committee exercises its power of closing the Exchange, and thus prevents its members from either performing its contracts on the Exchange, or observing its rules for closing them and determining the market prices, resort can be had to sales on the street, and even to fictitious sales in open violation of the rules. Upon that question no suggestion was made by counsel for the Governing Committee on the application for the *certiorari*, although it appears, at least to us, that the interests of the members are decidedly in favor of the construction for which we contend. Quite plainly a decision in our favor upon that question alone, would be fatal to the bill, and render unnecessary any decision by this court upon the other questions in which, as abstract propositions, the Exchange is said to be concerned.

In the Circuit Court the Governing Committee demurred to the bill, and the opinion of the court in overruling that demurrer shows that it was based upon the contention that the case was not cognizable in equity. (*Trans., p.* 25.) An answer was then filed, admitting the deposit of the money in the clearing-house, calling for strict proof of the other allegations, denying the complainants' right to any relief, and praying the benefit of a demurrer. (*Trans., pp.* 26-7.)

Mr. Gage, a member of the Governing Committee, and as such a defendant to the bill, acted as the pretended purchaser in the fictitious sale of the stock by petitioners.

We mention these facts here because we have not, in preparing this brief, had the advantage of seeing any brief which this adversary presents against us except that filed on the application for *certiorari*.

BRIEF.

I.

REGARDING THE CONTRACT OF AUGUST 3D, 1896, FOR THE SALE BY SCHWARTZ, DUPEE & CO. TO JAMIESON & CO. OF 1,150 SHARES OF STOCK, AS A COMPLETE AND VALID CONTRACT, IT WAS NOT A CONTRACT TO WHICH CLEWS & CO. WERE PARTIES. THEY WERE PARTIES TO THE ORIGINAL CONTRACTS OF SALE WHICH WERE MADE ON THEIR ORDERS, AND IT IS ADMITTED THAT, SO FAR AS CLEWS & CO. WERE CONCERNED, THOSE CONTRACTS WERE NOT CANCELED OR SETTLED BY THE CLEARING-HOUSE TRANSACTIONS, WHICH ONLY ADJUSTED THE MATTERS BETWEEN THE BROKERS. AS THE ORIGINAL CONTRACT MADE BY CLEWS & CO. REMAINED IN FORCE, THE SO-CALLED SUBSTITUTED CONTRACT DID NOT TAKE ITS PLACE EITHER IN FAVOR OF OR AGAINST CLEWS & CO. THEY COULD NOT BE PARTIES TO BOTH CONTRACTS, AND IT IS ADMITTED THAT THEY REMAINED PARTIES TO THE ORIGINAL CONTRACTS.

Beckhuson v. *Hamblet*, 2 Law Reports, Queens Bench Div., 18.

Higgins v. *McCrea*, 116 U. S., 671.

Irwin v. *Williar*, 110 U. S., 499.

Lehman v. *Field*, 37 Federal Reporter, 852.

II.

THE RULES OF THE STOCK EXCHANGE FORBID THE CLOSING OF A DEFAULTED CONTRACT, OR THE ASCERTAINMENT OF THE DAMAGES CAUSED BY THE BUYER'S DEFAULT, BY A SALE CONDUCTED BY THE SELLER ON THE STREET AND WHILE THE EXCHANGE IS CLOSED. SUCH A SALE BEING IN VIOLATION OF THE RULES, THERE IS NO BASIS SHOWN FOR A RECOVERY.

III.

THE SALE ON SEPTEMBER 22D, 1896, WHICH IS PLEADED IN THE BILL AND RELIED UPON IN THE EVIDENCE AS THE BASIS OF THE RIGHT TO RECOVER, AND AS FIXING THE AMOUNT OF A RECOVERY, WAS A FICTITIOUS ONE, VIOLATING BOTH THE RULES OF THE EXCHANGE, AND THE RIGHTS OF JAMIESON & CO. TO HAVE THEIR LIABILITY, IF IT EXISTED, DETERMINED BY A GENUINE AND NOT A FICTITIOUS TRANSACTION.

THE ACT OF THE PETITIONER IN CONDUCTING A FICTITIOUS SALE WAS AN ACT OF BAD FAITH, WHICH BARS THE RIGHT TO A RECOVERY IN EQUITY.

1 Pomeroy's Equity Jurisprudence, § 397.

IV.

NO RIGHT IS SHOWN TO MAINTAIN A BILL IN EQUITY FOR THE PETITIONERS' RELIEF, EVEN CONCEDING THAT THERE WAS A CONTRACT BETWEEN THEM AND JAMIESON & CO. WHICH THE LATTER VIOLATED.

ARGUMENT.

I.

THE PETITIONERS, CLEWS & CO. WERE NOT PARTIES TO THE CONTRACT OF AUGUST 3D, 1896, EITHER DIRECTLY OR AS UNDISCLOSED PRINCIPALS.

As the rights which are sought to be enforced in this case are purely contractual, we naturally take up first the question whether there was any contract between these parties, such as is pleaded in the bill and made the subject of such extended discussion in the brief. And for the solution of the problems which the case presents we are concerned only with determining whether a contract of sale was created in which Clews & Co. were sellers and Jamieson & Co. were buyers. It matters not what contract Jamieson & Co. had with Schwartz, Dupee & Co. or others, unless Clews & Co. were parties to it, so that the rights and the liabilities which it created could be enforced by them and against them. We may, therefore, for the sake of the argument, assume that the exchange of cards between Schwartz, Dupee & Co. and Jamieson & Co., of cards confirming the clearing-house substitution of August 3d created a valid contract between those parties for the sale of 1,150 shares of stock at $222, deliverable on August 31st. This, however, is not the goal, but the starting point of an inquiry which is directed at the fundamental proposition in the petitioners' case. It does not follow that because there was a contract Clews & Co. were parties to it; nor does that result follow from the fact that Schwartz, Dupee & Co. were their brokers; nor, again, does it follow, from the fact that this contract was the resultant of a number of contracts with Schwartz,

Dupee & Co. and others, to some of which Clews & Co. were parties. This is, if anything, a case of an undisclosed principal: it is so stated in the bill, and that is the theory of the evidence and the argument. To sustain it the contract must have been made by the agent on behalf of the principal, so that the latter was bound by it and could have been subjected to liability on it at the suit of the other party.

Starting with the assumption that on August 3d Schwartz, Dupee & Co. contracted to sell to Jamieson & Co. 1,150 shares of stock at $222, deliverable August 31st, let us examine the facts relied upon to show that Clews & Co. were *parties* to that contract.

To begin with, it is conceded that they never authorized or directed their brokers to sell 1,150 shares or to enter into any contract involving that number; nor did they authorize a sale at $222. All the communications between them and their brokers upon which their rights depend, were in writing, and we know just what they were. From them it is shown that the sales which Clews & Co. authorized for the August account, *and which were reported to them as made,* were of 500 shares on one day and 200 shares on another at $229. So far as the evidence shows they never so much as heard of the contract for 1,150 shares until after its alleged breach on August 31st. By all the ordinary tests of law and business dealings they were not parties to the contract for a greater number of shares at a less price, but the possibility of such a thing is inconsistent with the facts.

But counsel contend that in this case the ordinary rules of law and business give way to the operations of an ingenious machine which constructs contracts for the

ties out of quite indifferent material and without reference to the authority which they have given. It is upon the mechanism of this device that reliance is placed for the production of a contract differing so widely from that which the seller designed to make.

Before considering either the theoretical or the practical workings of the clearing-house, we deem it important to have this fact clearly in mind. When the clearing-house has notified the brokers of the changes which it has made in their contracts, they notify each other of their assent to the new arrangement. There is thus, between the brokers, an actual meeting of minds which would create all the elements of a definite contract, even had there been no clearing-house at all. There was thus, as between the brokers, an actual agreement, or as the circuit judge called it, "a conscious assent"—which was entirely lacking on the part of their principals. This is important in view of the conceded fact that the original contracts to which the principals did assent, *continued in force* as between them, though cancelled as between the brokers.

When a broker receives an order to sell it is his duty to fill it by making a contract of sale for the number of shares specified, and at the price named, or at the market price, if none is named. In doing this he exercises his principal's authority and the latter is therefore bound by the contract. He can enforce it against the buyer, and the buyer can enforce it against him. But if the broker departs materially from his instructions, he does not exercise his principal's authority, and the latter is not bound by a contract in violation of his directions and to which he did not assent. This is held in the case of *Beckhuson* v. *Hamblet*, 2 L. R. (Q. B.) 18, to which more extended

reference will be made. The buyer in such case could not hold the undisclosed seller, for he did not know him in the transaction, and was not misled by any appearance of authority, on the part of an agent who appeared only as a principal.

The same result follows between the principals of the brokers. Each principal can hold the other, where the brokers who made the contract followed the authority of their respective principals. Thus where the authority of the principals on each side is followed, the seller may hold the buyer's broker or the buyer himself, and *vice versa*. The brokers can always hold each other, irrespective of compliance with their instructions because they contract as principals.

Bearing these elementary rules in mind will assist in understanding the effect and the purpose of the clearing-house operations.

The connection between the petitioners and the contract of August 3d for 1,150 shares is based upon the theory that it is the resultant of the contracts which their brokers made on July 25th and 27th; that it was substituted for, and took the place of, the earlier contracts; that by novation Jamieson & Co. became the buyers in those contracts in place of the original buyers who were thus discharged. This plainly and necessarily involves the assertion that the seller constantly remained the same, but the buyer—as well as the price and the number of shares—changed each day.

In tracing this connection between the contract of August 3d and the contracts which Clews & Co. actually did make, counsel go back to the original sales for the July account. And they insist that it is necessary to do so

in order to prove their theory of the facts, and that the fact that the circuit judge treated the sales for the July account as being cancelled shows that he proceeded upon an erroneous theory. (*Brief, p.* 40.) It would certainly seem to follow that if the circuit judge was right, and the contracts for the July account were so cancelled that they did not add to the effectiveness of the August sales, as contracts to which Clews & Co. were parties, then a large part of the basis upon which their argument is built up is destroyed.

It seems to us plain that the fact that sales were originally made for the July account and "changed over" to the August account does not in any way alter the effect of the ultimate contract between the brokers on August 3d, or make parties to that contract any one who otherwise would not be. We shall therefore not attempt to discuss the very elaborate explanation presented by counsel for the petitioners, and by counsel for the Stock Exchange, of the method and the effect of this change. For in the end, and *as the aim* of what is described with great wealth of detail there results the extremely simple fact of a new contract of sale for August delivery. If the parties to the sale for July could reach and deal with each other they could readily arrange a modification of their contract as to delivery by mutual agreement. But as they cannot do so, or one party might not be willing to do so, the seller seeks to accomplish his purpose without reference to the buyer. He therefore sells the same amount of stock to another buyer for August delivery. This new contract obviously, and beyond any question, is binding upon the parties to it according to its terms, whose rigid simplicity are not changed by the purpose which actuated the seller in entering into it. In making this contract he does no

more than he would if he wished to have two sales outstanding, one for July and one for August. But he may not wish to do that, and this elaborate, and somewhat hypothetical scheme which counsel present has reference wholly *to his effort to free himself from the first contract.* This he does by what, in common parlance, is called "buying in" the July stock. But it is entirely immaterial to the buyer of the August stock whether the seller frees himself from the July sale or not; he may not even know that he is attempting to do so, or that he had such a sale. The rights and liabilities of the buyer of the August stock depend upon the terms of his contract, and the acts done under it, unaffected by the seller's prior transactions. Those transactions may have induced the new contract, and may have had something to do with fixing the price on which the parties agree. But the result arrived at is a new contract with a new buyer, made, *not by substitution* or *machinery, but by the actual meeting of minds;* and it is upon that new contract that the rights of the seller must rest.

We therefore regard the effort to press into the semblance of legal forms the successive steps of the process of "changing over" as the presentation of a mere side issue. But we cannot forbear to remark, though perhaps not germane here, that the elaborate scheme of fictitious purchases, sales and hypothetical orders for delivery, which are never issued or filled, all designed to produce a mere settlement of differences, as described by counsel, seems to imply much more of the illegal element which the Court of Appeals found in the transaction, than is required by the simple description of the transaction which we have given.

When we look at the telegrams by which this "change

over" was directed and reported we find the transaction stated, with the terseness of a telegram, just as we have stated it. For Schwartz, Dupee & Co. on being directed to change the 500 "at 2 cents or better" reported that they had done so by buying for the (July) account at $227, and selling for August at $229. And in reporting as to the 200 shares they first wired, "We have changed the 200 Match at 2¼ difference; *will give you prices later,*" and then wired again, "Bought 200 Match 226¾ account; sold 200 2nd account $229. (*Trans., pp.* 103-4.) In each case it will be seen that the "difference" is the excess of the price for August delivery over the price at which the July stock was bought in. And it therefore seems quite unnecessary to follow the discussion of counsel and witness as to whether this difference may properly be called "interest" or "commission" or "compensation."

We start then with the contracts of sale made by Schwartz, Dupee & Co. on July 25th and 27th for August delivery, and the question is whether the seller in those contracts became the seller in the contract of August 3d.

The clearing-house is created for the benefit of the brokers, not for the benefit of their principals. Its purpose is not to make contracts for the principals, but to facilitate the transaction of business between the brokers who contract in their own names. But for the fact that the brokers do so contract and thus assume a personal liability the scheme would not be feasible. It differs essentially from a bank clearing-house, to which counsel liken it, in several important respects. A bank clearing-house adjusts nothing but money balances upon an exchange of checks *which are payable on presentation.* It discharges contracts not by the creation of new ones, but by payment in money. The Stock Exchange clearing-

house, on the contrary, deals with contracts of sale which are neither payable in money, nor matured at the time they are entered in the clearing-house. If it can be truly said that the stock is regarded as a common medium, like money, it is still true that the contracts are for future delivery on which present payment (delivery) is not contemplated as in the case of bank checks.

We have called attention, in our statement of the case, to the fact that the parties to this case have by written stipulation agreed that the settlements and substitutions through the clearing-house are only settlements between the brokers, leaving the contracts of the principals unchanged and unaffected. But aside from this agreed statement of facts, a consideration of the character of the clearing-house substitutions will show that the new substituted contract between the brokers cannot be contracts of the principals.

In the operation of the clearing-house the brokers are treated absolutely as principals; the latter are disregarded and no attempt is made to affect their rights. In line with this theory purchases and sales made by the same broker for different customers are treated as off-setting each other; and purchases or sales which he makes with other brokers are treated as being susceptible either of complete cancellation, by the process of "ringing up" a large number of transactions between different brokers, or as being susceptible of the process of substitution, so that the broker may be directed to deliver stock to, or receive it from, some other than the broker with whom he originally dealt.

Thus, if a broker sells for A 500 shares of stock, and buys the same amount for B at the same price, these trans-

actions are entered on his clearing-house sheet as offsetting each other, so that he is not called upon to either receive or deliver any stock. In such case, in the language of Mr. Wilkins, he has "no stock in the clearing house." If there is a difference in the price of the purchase and sale, it is adjusted by a money payment. Therefore, after a broker has made two such transactions, he comes out of the clearing-house with nothing to receive or deliver, *so far as the other brokers are concerned.* And if he had no further transactions on the exchange after that day, his account in the clearing-house and with the other brokers would be entirely closed.

What, however, has been the result of these transactions upon the rights of his respective principals? If those transactions are affected at all as to the principals, then they are obviously affected in the same manner and to the same extent as they are between the brokers, which, in the case supposed, would be an entire extinguishment. The result of this would be that the buyer and the seller would each lose his contract, from the mere fact that without even knowing it they had happened to employ the same broker.

Suppose, however, that the broker has sold 500 shares for one customer, and bought 400 shares for another; in such case the purchase would balance the sale except to the extent of 100 shares, and his clearing-house sheet would show that balance still deliverable. By the adjustment of the clearing-house machinery he might be required to deliver those 100 shares to either the same broker with whom he made the trade or to some other broker, or even to several brokers. His obligation, however, upon the contract to buy 400 shares would, so far as the other brokers were concerned, be discharged by

this process of off-set. After this substitution of the balance of 100 shares is made the broker makes other purchases and sales, and puts these in the clearing house, together with the 100 share balance resulting from the previous transactions. And these transactions are again adjusted, and the result may be either that the off-set is complete, leaving no balance either way, or that his sales have been greater than his purchases, thus leaving a still larger balance for him to deliver. Or, on the other hand —and this is a most important feature—his purchases may be much greater than his sales, and he thus, as the result of the next day's transactions, may through the operation of the clearing-house, appear only as a *buyer* for a large number of shares.

In these different cases what are the rights of the principals for whom he acted, and what has become of their contracts? There can be no doubt that if the contract of the principal is affected by and follows through these various permutations, it does not—because it cannot—do so in its original form, but the changing situation of the broker each day becomes the situation of his principal. That is the theory of counsel for petitioners, and the theory upon which their case is based.

Even if there were no agreed statement of facts, this proposition involves a plain inconsistency. In the case of a broker buying and selling the same number of shares for two different customers at the same price, neither would have a contract for either sale or delivery; for as between the brokers, the contracts which they made were settled. In the case of the broker selling 100 shares more for one client than he had bought for another, the buyer would have no contract of purchase, and the seller a contract for 100 instead of 500 shares. And in the case

where, by subsequent transactions, this 100 share substituted sale was offset against other purchases, so that the broker stood on the next day solely as a purchaser, the seller's contract even for the balance of 100 shares would be entirely wiped out. And in the last case there would be added—upon the theory of opposing counsel—this result, which is so anomalous as to be impossible; if the original seller, through all these changes becomes each day a party to the new contract which has been evolved between the brokers from his original sale, he thus becomes a buyer instead of a seller.

It must be constantly borne in mind also, that these clearing-house settlements and substitutions do not involve the rights of one buyer and one seller, but the substituted contract is the resultant of the purchases and sales of a large number of different persons. It inevitably happens in many cases that a broker who has sold today a thousand shares for ten different customers will, through the clearing-house settlements, appear to-morrow as a seller for only 500 shares. In such case, which of his principals are parties to the substituted contract? It is plain that there is no offset or settlement of one particular purchase against another particular sale. The identity of each is lost, and the theory of the clearing-house is that it shall not be regarded.

The substituted contract in such a case cannot be regarded as a joint sale by all the ten principals, for half the amount of stock which they ordered sold; no such thing could by any possibility be within the contemplation of anybody. And yet, if any principal is a party to this substituted contract, all are parties.

If we were to admit that the contract thus substituted on the next day for their original sales of 1,000 shares,

was a contract to which they were parties, what shall we say is their position when, through the offsetting of *purchases* made by the broker the following day for other parties, there results a substituted contract in his name, in which he appears only as a buyer? Or in which his account is cancelled, and he has no stock either receivable or deliverable?

If the substituted contract which is made by the clearing-house and confirmed by the broker, is one in which the broker is the agent for his undisclosed principals, and the latter are therefore parties by representation, it necessarily follows that every principal whom he represented in the transactions which finally went to make up this substituted contract, is a party to it, and that it can be enforced, both in their favor and against them. This, of course, means that whatever the substituted contract is—whether a purchase or a sale, and although it is a purchase to-day and a sale to-morrow, all of the principals are parties to it. Surely a theory which seeks to accomplish such impossibilities as to suggest mere jugglery, should be supported by some more direct and binding authority from the principals, than can be implied from a simple direction to buy or sell a specific number of shares at a specific price.

It is always easier to follow a concrete than an abstract case. And to show that the different results thus arrived at are not purely speculative, but the necessary consequence of the petitioners' theory, we call attention to the actual facts with reference to the very transactions involved in this case.

An examination of the different clearing-house sheets of Schwartz, Dupee & Co., beginning with July 25th—

the date of the sale of 500 shares—shows how these stock balances are carried forward. Their clearing-house sheet for that day shows that they sold 500 shares to four different brokers, one of the sales being of fifty shares to Jamieson & Co. As they had no purchases for the August account on that day, this made the balance of their sold shares 500, and it was so marked in their clearing-house sheet. (*Trans., p.* 67.)

Their clearing-house sheet for July 27th (the next business day), therefore, begins with the statement that 50 of the 500 shares have been substituted to U. G. Peters & Co., and the remaining 450 to A. L. Dewar & Co. On that day they made but one sale; this was of 350 shares to R. A. Peters. It will be remembered (as we have shown in our statement of the case), that this was the day on which they made the second sale for Clews & Co. of 200 shares, and this 200 shares, therefore, was included in the 350. But at the same time they bought back the 350 shares from Peters, to whom they had been sold, at the same price. This offset the new sale which they had made, and left them sellers for only the balance of 500 shares resulting from the previous transactions for Clews & Co. Their clearing-house sheet, therefore, on that day shows only this balance deliverable, and the 350 purchase and sale is cancelled. Thus it is shown beyond dispute that at the end of this day, when Clews & Co. had sold 700 shares of stock, Schwartz, Dupee & Co. had in the clearing-house *for their benefit and that of others* only 500 shares. (*Trans., p.* 70.)

On the following day, July 28th, the clearing-house sheet of Schwartz, Dupee & Co. therefore began with this balance of 500 shares, which is shown to have been all substituted to A. L. Dewar & Co. Thus, on the peti-

tioners' theory, there had arisen a contract to which they were parties, obligating them to deliver to Dewar & Co. 500 shares at $225.25, *as the outcome of sales aggregating 700 shares at $229.*

Nor is this all; for if the sales made for the petitioners thus went into the substituted balance, the 150 shares out of the 350 in which their 200 sale was incorporated on the 27th, also went to make up this balance—and the principal for whom those 150 shares were sold was just as much a party to this new contract as they were.

If Schwartz, Dupee & Co. had made no further sales, against whom could the petitioners have enforced a right to deliver 700 shares of stock? There is no doubt that, upon their theory of the case, they could not have enforced such right against any one. On the other hand, could Dewar & Co. have enforced that contract against them, and have compelled them to deliver 500 shares at $225.25, when every share of the 700 which they had sold had been sold at $229? Clearly not.

The transactions, however, of Schwartz, Dupee & Co. through the clearing-house did not stop on July 28th, with this substituted balance of 500 shares as the result of contracts to deliver 850, but on that day they made for new clients and to different brokers additional sales, amounting to 750 shares. But for these sales—in which the rights of new clients were obviously involved—the number of shares deliverable by them would not at any time after July 27th have equalled the number of shares deliverable by the petitioners alone. (*Trans., p.* 71.)

These additional sales, with the 500 substituted from the day before, made a total of 1,250 shares; and their clearing-house sheet for the next day, July 29th, accord-

ingly shows that these 1,250 shares were split up among three brokers—50 being substituted to Brewster & Co., 1,050 to Lobdell & Farwell, and 150 to Jamieson & Co. On that day Schwartz, Dupee & Co. then sold 150 shares to two different brokers, but they bought 300 shares—100 from Brewster & Co. (to whom 50 shares had been substituted from the previous day), and the remainder from other brokers. Their new purchases were thus double the amount of their new sales, and the effect, as entered on their clearing-house sheet, was to make them sellers for only the balance of 1,100 shares, which it will be noted was less than their balance from the previous day. (*Trans., p.* 73.)

On the next day, July 30th, Schwartz, Dupee & Co. sold no stock, and this 1,100 shares which they still had deliverable was substituted—1,050 to Lobdell & Farwell, and 50 to Jamieson & Co. (*Trans., p.* 74.)

On July 31st they made no sales, and the 1,100 balance was substituted—700 shares to Frank & Bro., and 400 to Wilson & Sturges. (*Trans., p.* 75.)

On August 1st they made one sale for 50 shares, and this, with the balance from the previous day, made a total of 1,150, of which 50 shares were on that day substituted to Jamieson & Co., and 1,050 to Raymond, Pyncheon & Co. This was followed by the substitution on August 3d of the entire 1,150 shares to Jamieson & Co., which is relied upon as making the contract upon which petitioners claim the right to sue as undisclosed principals.

Now the question presents itself—why is it, that through all these combinations the identity of Clews & Co.'s sales has been preserved, even when the amount of stock deliverable was less than their 700 shares, and so

that they became parties to the last substituted contract? And what has become of the rights, and what is the situation, of the other customers of Schwartz, Dupee & Co., *for whom more stock was sold by them than was sold for Clews & Co.?* Is there any theory suggested which can give Clews & Co. the right to claim this substituted contract as theirs, eliminating and disregarding the rights of the others, for whom, after the contract of Clews & Co. had been made and put into the clearing-house, new sales were made for more than 700 shares?

The total sales made by Schwartz, Dupee & Co. after July 27th (even eliminating the 150 shares sold that day in connection with the 200 shares of Clews & Co.) amount to 950 shares. If the substituted contract of August 3d, the resultant, as it is said, of all of these transactions, called for the delivery of enough shares to fulfill the contract of Clews & Co. and the other customers for whom Schwartz, Dupee & Co. made sales, there would be more plausibility in the contention that the identity of the transactions was in some way preserved; but such is not the case. These other customers had contracts for delivery of 950 shares, and it would take a contract for 1,650 shares to satisfy their sales and those of Clews & Co. The rights and obligations of these parties cannot be disregarded. Jamieson & Co. were under just as plain a liability to them, as contracting parties in this substituted contract, as to Clews & Co.

What can be said, too, of the rights and liabilities of the persons for whom on July 29th Schwartz, Dupee & Co. bought 300 shares? Have their contracts entirely gone out of existence, or have those parties some interest in this final substitution? It is plain that if the mere fact that a sale for one customer is a factor in the produc-

tion of the last substituted contract, makes that customer a party to such contract, the influence of a buyer is just as great as that of a seller.

All this "confusion worse confounded" is avoided by regarding the adjustments through the clearing-house as being mere adjustments so far as the brokers are concerned, leaving the contracts of their principals as they were originally made. And from this chaotic mass of confusion we must turn with a certain sense of relief to the agreed statement of facts in this case, in which all parties to the litigation agree and say that the transactions on behalf of the principals, "so far as the different principals are concerned, were not settled or cancelled by any of the substitutions, nor by any of the settlements between the brokers. * * * In other words, the settlements by substitutions or otherwise through the clearing-house, were merely settlements between the members of the stock exchange, and were not settlements or cancellations of contracts between the principals whom the brokers represented and the brokers themselves." (*Trans., p.* 78.)

The preservation of the identity and the integrity of the original contracts made by the principals through the brokers is plainly inconsistent with the existence of a subsequent contract to which those principals were parties. It would be a misuse of terms to say that these subsequent contracts were substituted for original contracts which still remained in force; and it would be a patent absurdity to say that Clews & Co. were still liable upon, or entitled to enforce, the two original contracts for 500 and 200 shares, made by them on July 25th and 27th, and were also liable upon or entitled to enforce another

contract for a greater number of shares, at a different price.

Further than this, the case happens to show another concrete illustration of the effect of the admitted preservation of the original contracts. In selling the 500 shares on July 25th, Schwartz, Dupee & Co. sold 50 shares to Jamieson & Co. at $229. There thus arose, upon the theory of undisclosed agency, a contract between Clews & Co. and Jamieson & Co., for the sale and purchase of 50 shares at $229. If no subsequent transaction had been had, that contract would, as counsel will admit, have gone to its maturity and could have been enforced by and against Clews & Co. and Jamieson & Co. It is admitted by the agreed statement of facts that the contract thus made still existed, and was not cancelled or discharged by the subsequent clearing-house operations. We have then, a contract for a sale of 50 shares from Clews & Co. to Jamieson & Co., and at the same time, as it is claimed, a contract with them for a sale of 1,150 shares, of which 700 belonged to the petitioners. From this there is no escape.

It is unnecessary for the decision of this case to determine just what the result is, between the broker and his own principal, of the cancellations and substitutions through the clearing house by which the brokers make new contracts as between themselves. For if the principals do not become parties to these new contracts, then this suit cannot be maintained, and the dismissal of the bill was inevitable. The question whether the principals become parties to the new contracts is by no means dependent upon the effect of the new contract as between the broker and his principal. But the result as between the principal and the broker seems to work out logically

and necessarily to what is admitted in the agreed statement of facts. The broker, having used his principal's contract for his own benefit, is bound to see that his principal gets whatever would have resulted from the contract. A principal who has bought or sold is entitled to performance of his contract and to the benefit of his bargain. If the broker has bought 100 shares and by an offset of a sale for an equal or greater number he comes out of the clearing house discharged from the obligation of receiving it, the substantial result is that he assumes the obligation to deliver it to his principal, for the latter's right to receive it still exists. Doubtless the broker would in most instances make the delivery with the stock received from a customer for whom he had made a sale, or delivered to him by another broker, or settle the difference in money where that sort of speculation was the purpose of the parties. But the source from which he would get the stock or fund to perform his obligation to the principal does not affect the existence of the obligation.

The agreed statement of facts says that the original contract made for the principal is, as between him and his broker—as well as between him and the opposite broker and principal, unaffected by the clearing house transactions. And in that part of their brief where they treat of the question of gambling, counsel state that the "daily novations and substitutions" do not absolve the parties from the obligation to deliver or receive the number of shares contracted for at the time specified. And their argument is that the operations of the clearing house have furnished the broker with the means, in money and contracts of doing this. Is not this but another way of saying that the principal receives performance of the contract from his broker? If the principal has sold, he de-

livers the stock to his broker on the account day and receives the contract price, which the latter has already received from a buying client, and through the daily money settlements in the clearing house. And on the other hand, if he is a buyer, he receives the stock from his broker, and pays him the price.

Much space is spent by counsel for petitioners in showing that the difference between the contract price in the original sale and the constantly changing price in the substituted contract is "equated" by the daily payments of money through the clearing house; and they say that this is contemplated and intended by the parties in entering into the original contract. In other words, that the parties intend to settle by the payment of money differences. But even if this is so, it does not make the principal a party to each new substituted contract. For these cancellations and substitutions change not only the price, but the number of shares; and the result is as likely to be a cancellation of the brokers' obligation to deliver or receive as a new contract to buy or sell. The principal is either a *party* to, and bound by, the result reached each day by the clearing house operations, or he is not a party to any of them. And not only is this so, but *each* of the principals in the contracts which go to make up the substituted contract is a party to it, *even if as in this case that contract does not call for enough shares to satisfy his contract.*

The conclusion is forced upon us that, as counsel use the word, and describe the transaction, "equating" is but a euphemism for "settlement by payment of differences." Thus we are contending for a construction of their clients' contract which would make it legal on its face, and they for a construction which imputes an intention to "equate"

the contract by paying or receiving the difference between the market and the contract price.

It is, however, contended by opposing counsel that the rules of the Exchange with reference to account trading provide for just this kind of necromantic transformation; and that customers dealing on the exchange contract with reference to the contingencies which the operations of those rules may create. They contend that an order to buy or sell for the account gives a sort of roving commission to the broker, after making the contract in accordance with his instructions, to substitute for it any sort of contract which his purchases and sales on behalf of himself and other customers may render necessary or expedient. And to this new contract, they argue, no matter how much the process of evolution or revolution may have changed it from its original *species,* the principal has, in advance, authorized his agent to bind him. No one claims that there is any evidence that Clews & Co. *actually* gave any such instructions, or *actually* knew of the rules and practice of the Stock Exchange, to which reference is made. The proposition is concededly based upon a presumed knowledge from the mere fact that they directed a sale "for the account."

In support of this counsel quote the following statement of the well-known rule from the decision of this court in *Bibb* v. *Allen,* 149 U. S., 481:

> "It is settled by the weight of authority that where a principal sends an order to a broker engaged in an established market or trade, for a deal in that trade, he confers authority upon the broker to deal according to any well-established usage in such market or trade, especially when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the

> principal and agent, or involves no departure from the instructions of the principal; provided, the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals or public policy."[1]

The rule thus stated, it will be noted, is, that authority is given to deal according to an established usage, *which does not change in any essential particular the contract between the principal and agent, and involves no departure from the instructions of the principal.* If this qualification is not one which applies to a case in which a contract to sell 100 shares at one price is transformed into a contract to sell 200 shares at a lower price, or perhaps transformed into a *purchase* of a still different number of shares, we are at a loss to understand what case the court could have had in mind to which the qualification would apply. Under such circumstances an essential change in the contract is effected, and an essential departure from the instructions of the principal is made. And it is only by what amounts to almost an abdication of reason that we can presume an intention on the part of a customer, to allow himself to be bound by contracts so constantly shifting and so widely varying in their changes from the actual contract which he contemplates and orders.

This is well stated by the circuit judge in his opinion, although he regarded it as necessary for the purposes of his decision, to speak only of the presumed authority to change the contract price. On this question he says:

> "The only question is, whether the complainants were parties principal to the contract between Schwartz, Dupee & Co. and defendants. The evidence discloses that their authority to the brokers was to sell 700 shares of this stock at 229; and while

the authority to sell for more than this might be implied; authority to sell for less could certainly not be. They were entitled under their contract with Schwartz, Dupee & Co. to a purchaser at 229 or more. They were bound to no sale at a figure less. Neither Schwartz, Dupee & Co., nor any persons with whom that firm had contracted, could have compelled the complainants to deliver the stock at a price less than 229; but the contract between Schwartz, Dupee & Co. and the defendants was for the sale of 700 shares at 222. Under the contract between the brokers the defendants could have demanded a conveyance at 222. But of whom could they have made such demand? Certainly not from the complainants; their contract was for 229 and no less. The devices of the exchange for clearing and counter-balancing accounts between the brokers could not without their consent change so essential a term of the complainants' sale. It cannot be that authority from a principle to sell at 229 can, without his conscious assent, be transformed into an authority to sell at 222. The original understanding that the sale should be made under the rules and practice of the Stock Exchange, cannot be interpreted to give such elasticity to the all important feature of price. Who would deal on the Exchange, as principal, if it were understood that the prices named had no fixity, that the obligation might be one thing to-day and another totally different thing to-morrow? While the substitutions, resulting in prices unquestionably different from those originally authorized, bind the brokers participating, they do not, in the absence of assent, reach over so as to change the contract rights of the principal. To hold otherwise would be to abolish by judicial pronouncement the authority, on the faith and stability of which every transaction on the Exchange is grounded." (*Trans.*, 82-2.)

In the case of *Bibb* v. *Allen*, upon which opposing counsel rely, the rules of the Exchange did not involve any of the material changes in the contract of the principal

which this case shows. And in addition to this the brokers there did not rely upon a mere presumption of knowledge on the part of the principal that the contract would be regulated and affected by the rules of the Exchange; for actual notice to them of that fact was shown. And this is stated by the court in saying that the rules formed a part of the contract. We quote from that part of the opinion:

> "These rules, which were authorized to be made by the statute of the State of New York, under which the Exchange was incorporated, enter into and form a part of the contracts of sale in this case. The defendants (the brokers) in one of their earliest communications to the plaintiffs, informed them that they would use in their telegraphic correspondence what was known as Shepperson's code, which provided that, *"unless otherwise stated as agreed it is distinctly understood that orders sent by this chapter are to be subject in every respect to the by-laws and rules of the market where executed,"* and further that, *"with every telegram sent by this table the following sentence will be read as a part of the message, viz: this sale has been made subject to all the by-laws and rules of our Cotton Exchange in reference to contracts for the future delivery of cotton."*

In the case at bar the contention that Clews & Co. were bound by these rules of the Exchange, which, it is said, could work such a strange transformation in their contract, is based solely upon presumption. There is no evidence that they had actual knowledge of the rules—to say nothing of knowledge of the results which are now claimed to flow from the clearing-house transactions. There is no evidence that they ever heard of any of the substituted contracts which were made before August 3rd, *nor that they ever heard of that contract until after Jamieson & Co. had refused to receive the stock.* Their

names were not so much as mentioned until September 9th, and then only in a letter from Schwartz, Dupee & Co. to Jamieson & Co., stating that on August 31st Schwartz, Dupee & Co. had tendered Jamieson & Co. 700 shares (*which was not true, as the tender was of 1,150 shares*) and that the sales were on behalf of Clews & Co. (*Trans., p.* 40.) On the next day the attorneys of Clews & Co. gave notice that the stock would be sold on September 15th. This is the first act by Clews & Co., and to call it their act we are to presume authority to the attorneys to perform it. But what is the basis of a presumption as to *when* this authority was given? So far as the evidence shows there was no communication between Schwartz, Dupee & Co., or the attorneys, and Clews & Co. until after August 31st. The probability is that there was none: for certainly there was no occasion for it until Schwartz, Dupee & Co. knew that the stock would not be accepted. But the burden of showing a fact peculiarly within their own knowledge and upon which their rights depend is certainly upon the complainants in a case.

The only fact upon which reliance is placed either by counsel for the Stock Exchange or counsel for the petitioners, as showing that Clews & Co. were bound, not only by the rules of the Stock Exchange which regulated the performance of their contract, but by rules which are said to authorize its complete transformation, is the fact that in their telegraphic orders they directed sales "for the account." The argument is, that this use of the word "account" has a special meaning, which carries with it by implication authority to make all these changes.

It will be observed that in the rules no definition is given of the expression "for the account," except such as is implied from the provision that deliveries and sales

"for the account" shall be made on the last day of each month. Mr. Wilkins, as a witness for the complainants, testified to the meaning of this phrase as follows:

Q. What do you mean by the account?

A. It means 500 shares of stock which is to be delivered and paid for and taken at the end of July. The delivery day for July is the last day of the month, or for any account is the last day of the month.

Q. Then the technical meaning of the word account is future delivery, in effect?

A. Yes, sir.

Q. I mean for the same month?

A. Yes, sir; for the month in which it is sold.

Q. So that the word account really means the account day of that month?

A. Yes, sir. (*Trans., p.* 110.)

The witness then explains the use of the words "first account" as referring to the current month, and "second account" as referring to the succeeding month; this does not, however, in any way change the definition which he gives.

If we could indulge in presumptions in favor of the complainants, who have the burden of proof, it cannot with fairness be said that they can, by presumption, be credited with having a different knowledge of the meaning of the word "account" than is thus given by the manager of the clearing-house. As he describes it, it is a phrase referring to the time of delivery.

Mere presumption, however, cannot be made the basis of binding Clews & Co. to a practice which would work such a radical change in the contract into which they designed to enter. This is decided in the case of *Irwin* v.

Williar, 110 U. S., 499. In that case reliance was placed by the broker on the binding effect upon his customer of the practice of the Baltimore Board of Trade with reference to purchases and sales for future delivery. The custom there relied upon was quite similar to the theory of substitutions which underlies the petitioners' claim in this case. It was the practice there for commission merchants, as between themselves, to set off one contract against another, settling between them the difference in price, and each substituting on his books some new customer. This was done not only where the broker had bought and sold for different customers, but where the transactions of a number of brokers were settled by "ringing up." How similar this custom was to the description given in the petitioners' brief is shown in the following quotation:

> "In such case all margins put up by the commission merchants are restored, contracts surrendered, and the contracts or orders of their undisclosed principals, upon whose instructions they had entered into those contracts, are held in lieu of the contracts so surrendered, each commission merchant being responsible to each of his customers for performance by the others.
>
> "The settlements of differences made by defendants in error on account of Davis & Irwin were made in pursuance of these customs, but there was no evidence that Davis & Irwin had any knowlege of it."

In holding that there could be no presumed intention on the part of the customer to be bound by this practice on the Exchange, in the absence of actual knowledge of such practice, Mr. Justice MATTHEWS said:

> "The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they allege in their

declaration, did obtain a responsible purchaser; so that the plaintiff in error would upon the contract of sale against such purchaser, when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself, for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of settlement, in anticipation of the maturity of the contracts, the brokers, by an arrangement among themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging contracts, so as to substitute new purchasers and new sellers, respectively, for the balances. The question is not whether in a given case, without the assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the Exchange, without other knowledge of the custom, makes it a part of his contract with the broker."

The justice then examines a number of English cases on the subject, relating to the customs of the London Stock Exchange (upon which such great reliance is placed by opposing counsel). He quotes with approval the statement of Lord Chelmsford, that the customer—even if unacquainted with the usages upon the market—gives authority to his broker to make contracts on the footing of such usages, provided "*they are such as regulate the mode of performing the contracts, and do not change their intrinsic character.*" And, quoting further, that such a custom, "if allowed to prevail, would work a change in the relation between the broker and his principal, by permitting the agent to buy, to convert himself into a principal to sell." Mr. Justice MATTHEWS then concludes:

"This exchange and substitution, and payment of

differences to effect it, *working, as it does, a complete change in the nature of the seller's rights and obligations, cannot be made without his assent; and that assent can be implied only from knowledge of the custom which itself authorized it.* The Circuit Court, therefore, erred in permitting proof of this custom, without evidence that the defendant below had knowledge of it, and in not instructing the jury to disregard it, if they were satisfied from the evidence that such knowledge had not been satisfactorily shown."

It is a clear proposition that no contract arose between Jamieson & Co. and Clews & Co., unless the latter were bound equally with the former the moment the contract was made. The mutuality of obligations is an essential element of a contract. It is, therefore, of no consequence that Jamieson & Co. knew the rules: for unless Clews & Co. were bound to them, they were not bound to Clews & Co. Under the decision in *Irwin* v. *Williar,* Clews & Co. could not have been held liable by Jamieson & Co. upon the substituted contract; for there is an utter absence of any knowledge on their part of the practice upon which that contract was founded, and nothing from which assent to that contract could be inferred. Stating that they were not bound to Jamieson & Co. is but another way of saying that the latter were not bound to them.

But here again, upon this question of assent by Clews & Co. to this practice of substituted contracts, we have only to take the rule of law as the petitioners state it, and the agreed statement of facts, to destroy the theory of their argument. For their statement is that the parties contract with reference to the rules of the Exchange, and the principals give authority to their brokers to accomplish the results which those rules render possible. By the agreed statement of facts it is conceded that these set-

tlements and substitutions through the clearing-house did not settle or cancel the original transaction, so far as the rights of the principals were concerned, but were only settlements between the members of the Stock Exchange, leaving the contracts between the principals represented by the brokers and the contracting brokers unimpaired.

The case, therefore, is concededly brought exactly within the decision of Judge Grosscup, that the new transactions bind the brokers, but "do not reach over so as to change the contract rights of the principals." If, as all parties thus agree, the rules of the Stock Exchange do not contemplate a change in the contract, or the contract rights, of the principal under his original agreement, but merely arrange a settlement between the brokers themselves, affecting only their rights, upon what possible theory can it be contended that a simple order to buy or sell has attached to it an authority exactly contrary to the admitted meaning and effect of these rules of the Exchange?

The case of *Higgins* v. *McCrea,* 116 U. S., 671, has in it some features similar to those of this case. That was an action between a broker on the Chicago Board of Trade and his principal, and it involved the effect of a practice on that Exchange, by which the broker was allowed—after having made a contract of sale, to substitute another purchaser in place of the original one. In that case the broker, through the operations of the clearing-house of the Exchange, settled and discharged the original parties to the contract, but did not actually make a new contract with another person, who was thus substituted as a buyer in place of the original party. The court held that this was not a compliance with the rule. We quote from the opinion:

"After the contracts made by them (the brokers) for the day had been offset against others and thereby cancelled, no other contracts were substituted in their place which the defendant could have enforced. In fact, there was no substitution—no contracts were designated to take the place of those so cancelled. All that the plaintiffs say on this point is that it was their purpose to apply the first purchase delivered in August on contracts of sale first to the oldest contract of purchase, and it was uncertain on what contract the first delivery would be made until the delivery actually took place. If there was any substitution of other contracts for the cancelled ones, it was only in the mental operations of the plaintiffs, to which no outward expression whatever was given. The plaintiffs admit in their evidence that after the original contract made with the defendant was offset and released, they alone were bound to the defendant, and that there was no other person against whom the defendant could have maintained an action."

If it were conceded that the original contracts made by the principals were cancelled by the substitutions, it would still be plain that no new contract was thus actually substituted in the place of the original agreement. Take, for instance, the sale, on July 27th, of the 200 shares; this was, it is said, a part of the 350 shares sold to Peters on that day; but that trade was immediately canceled by purchasing the same number of shares at the same price from Peters, and the substitutions in the clearing-house, as the result of that day's transactions, were of only the 500 shares coming over from the day before. Thus, in cancelling that order, Schwartz, Dupee & Co. not only did not substitute any contract upon which Clews & Co. could have held the hypothetical new buyer liable, but their outstanding sales were actually less than the amount called for by the two orders which they had executed for

the petitioners. As was said in *Higgins* v. *McCrea, supra,* "No contracts were designated to take the place of those cancelled."

Where a similar practice on the Cotton Exchange was involved it was said:

> "It was necessary that the plaintiffs (the brokers) should have had contracts for the delivery of cotton of the same quality, at the same price, and at the same time provided in the original contracts of purchase, contracts corresponding in all respects with the original contracts had they remained uncancelled and in force; in other words, contracts to be substituted for the original contracts."
>
> *Lehman* v. *Field,* 37 Fed. Rep., 852.

It is asserted by opposing counsel that Clews & Co. became parties to this substituted contract by ratification. This contention is obviously inconsistent with the theory of a prior authority—and upon the theory of a prior authority, and the several consequences which would flow from the existence of such authority, the case as a whole must rest. If such prior authority existed, there was neither necessity for ratification, nor should we expect to find any subsequent act in the way of confirmation of an agreement by which the parties already understood they were bound.

There is an utter absence of anything in the nature of confirmation by Clews & Co. of this contract. We have pointed out that not only was there no knowledge on their part of the custom by which their contracts could be so materially altered, but no knowledge on their part that such alteration had taken place. There was no knowledge on their part of the tender of 1150 shares on August 31st, nor of the fact that only by a tender of that number

of shares could compliance be made with this new contract to which it is said they were parties.

When tender of performance was thus made, Jamieson & Co. declined to accept the stock. And it is clear from the evidence that on that day nothing had been done by Clews & Co. which would have bound them to the contract, if it was not originally obligatory upon them. So far as any act on their part is concerned nothing was done until their attorney gave notice of the sale of the 700 shares of stock. It must be a clear proposition that they could not, by even the most express ratification, at that time, have increased the liability of Jamieson & Co., or imposed upon them a liability which did not exist when they refused the tender of the stock on August 31st.

We do not think counsel will contend that if this stock had gone to $250, which would have made a great profit to Jamieson & Co., and consequent loss to Clews & Co., a recovery could have been had against the latter, with no more evidence of either original authority or subsequent ratification of the contract than is shown in this record. Unless the contract could have been enforced by Jamieson & Co. under such circumstances, by suit in their own name, it cannot be enforced against them.

The English cases from which such liberal quotation is made in the brief of opposing counsel relate, mainly, so far as applicable to this case, to the question whether a contract arose between Schwartz, Dupee & Co. and Jamieson & Co., through the machinery of the clearing-house. They do not involve the question whether a substituted contract made by a broker with another, for a different number of shares than that which his client directed him to sell, creates a contract between the latter

and either the broker or the undisclosed principal on the other side.

In *Maxted* v. *Paine*, 6 L. R. Ex., 132, the plaintiff had, through his brokers, sold to A, a member of the London Exchange, ten shares in a company. On the delivery or "name day," A passed to plaintiff's brokers a ticket containing the name of G as the ultimate purchaser, and *he was accepted by the plaintiff as such and the stock transferred to him.* G had in fact been employed by still another principal to act as purchaser, for a consideration, *but this was not known to the defendants.* A was afterwards compelled to pay assessments on the stock, and sued the defendants to recover them. It certainly would seem that on these facts much that was said as to the purpose or effect of transactions on the Stock Exchange was unnecessary to the decision. The purchasing broker disclosed his principal at the time when the rules of the Exchange required, and that principal *was accepted by the plaintiff as the contracting party.* This of itself would, to put it very mildly, go far towards discharging the broker; for the seller, when the principal was disclosed, had a right of election and could not hold both principal and agent. But the seller did more than this, he transferred the stock to the man whom he accepted as principal, thus *executing* the contract with him. The agent was thus completely discharged; and the liability which the plaintiff sought to enforce against him was not upon the contract made in his name, but for a *subsequent* failure of his principal to pay assessments on the shares. The obligation to pay those assessments was not upon the defendant, for the stock was not transferred to him but to his principal. It was an obligation which attached to the ownership of the stock, and the principal was lia-

ble for it because the stock was transferred to him. This was plainly sufficient to discharge the broker for liabilities based upon a subsequent default of his principal, and upon facts of which he was ignorant when he made the contract.

The question involved in this case, however, is decided in the most recent English case upon the subject, and exactly sustains the view for which we contend. This is the case of *Beckhuson* v. *Hamblet,* 2 L. R., Queen's Bench Division, 18. The facts in that case were as follows:

The defendant, having through his brokers purchased 210 shares for the "first account," directed his brokers to carry them over to the "second account," which would expire on December 29th. The brokers, having orders from other clients for purchases of the same stock, bought by single contract in their own name 360 shares from the plaintiffs, who were jobbers on the Stock Exchange. They apportioned on their books 210 of these shares to the defendant, their principal in the transaction. Before the settling day the brokers who made this purchase failed, and their transactions were closed out on the Stock Exchange in accordance with the rules.

The plaintiffs, from whom they had purchased the 360 shares, having ascertained that the brokers were acting for the defendant in regard to 210 of those shares, tendered that number to him, and on his refusal to take them, sold them on the settling day, in accordance with the rules of the Exchange, and sued him for the difference between the contract price and the selling price.

It will thus be seen that the case presented exactly the question which is here involved, and that the facts

were far stronger in favor of the liability than can be claimed in this case. For there no question of substituted contracts was involved, and the purchase covered a greater number of shares than the defendant had directed the brokers to buy, only because the latter had included in one contract in their own name the orders of several customers. It was upon that direct contract that the suit was based. The case would, therefore, be exactly similar if there had been here no substitutions or cancellations, and if Clews & Co. were suing as to 200 of the 350 shares which Schwartz, Dupee & Co. included in one single sale to Peters on July 27th. Or, if Schwartz, Dupee & Co. had received an order from Clews & Co. to sell 700 shares and had included it in one entire sale of 1,150 to Jamieson & Co.

It was held that as the brokers included the defendant's order with that of other clients, and had contracted in a single transaction with the plaintiff for the purchase of a larger number of shares than the defendant had authorized them to purchase for him, no contractual relation existed between the plaintiffs and defendant, and the action could not be maintained. Mr. Justice Kennedy in delivering the opinion of the court comments at length upon the Stock Exchange methods, and says that the settlements effected between brokers under the rules of the Exchange are what may properly be termed *domestic settlements,* not intended to affect outsiders.

He then states that the question of the right of action depends upon whether the transaction created privity of contract between the plaintiffs and the defendant, as an undisclosed principal, and that if the contract between the plaintiffs and the defendant's brokers was one, by "virtue of which the plaintiffs, as the sellers, and the defendant,

as the principal of the buying broker, came under an enforcible liability as to each other in respect to its performance," then there might be a recovery. He then continues:

"It appears to me to be clear in regard to these Stock Exchange proceedings, that, to borrow the language of James L. J., in *ex parte Grant, in re Plumbly* (13 Ch. Div., 667), 'whatever the liabilities and the rights of the outside world may be, they remain unaffected.' But the failure of these contentions on behalf of the defendant leaves standing, as it seems to me, that which, according to my view of the case, is a real and fatal obstacle to the plaintiff's success in this action. It appears to me that no contractual liability of the defendant to the plaintiffs ever existed in respect to this transaction. The defendant's authority to the broker was to 'carry over'—in substance and effect to buy for him for the end of December account—210 Louisville shares. What the broker did was to buy in his own name from the plaintiffs for that account 360 Louisville shares. He did that which is, I believe, a common thing, and often no doubt from the business point of view a very convenient thing. He lumped, if I may use the word, the orders of two clients in one contract of purchase in his own name. In so doing he acted, I doubt not, in perfect good faith, allocating in his books a proper proportion of the total number of shares contracted for to the two clients, respectively; *but it appears to me that the contract so made was his contract and not a contract of either of his clients.* A very similar course had been taken by the broker, the plaintiff in the action, upon the London tallow market, in *Mollett* v. *Robinson* (L. R. 5, C. P. 646, 7 H. L., 802.) The defendant there was in a position analagous to that of the defendant here, and Simpson & Co. in a position analagous to that of the plaintiff here. Blackburn, J., in his judgment in the Exchequer Chamber points out the necessary result: 'The defendant could not call upon Simpson & Co. to deliver him 50

tons of tallow under the contract of the 2nd of April, because Simpson & Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson & Co., if willing to deliver the smaller quantity of 50 tons, compel the defendant to accept them, because, if they had been unwilling sellers, the defendant could not have forced them to deliver that smaller quantity. And I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiff's name and sue upon the contract *pro tanto* for himself."

The judge then quotes from the opinion in the same case in the House of Lords, the statement that the difference between the quantity called for by the contract and the orders of the defendant "prevented them from being contracts with the defendant." Taking up, then, the usages of the Stock Exchange, he says:

"There is no usage of business on the Stock Exchange which can, as the plaintiff's counsel seemed to suggest, avail to help the plaintiffs through this difficulty. There is a usage, no doubt, that the stock broker contracts in his own name. It by no means follows from this that he should lump the orders of several clients, and buy, not what a particular client has authorized, but a different and larger quantity. But let it be assumed that the usage exists in its most ample form. Let it be assumed that there is a usage on the Stock Exchange, legally valid and known to and binding upon a client such as the defendant, that a stock broker employed in the purchase of shares for a client properly may, if he thinks it convenient, fulfill his duty to his client, although, instead of creating, as it is ordinarily a broker's duty to create, a contractual relation between his client and the seller he lumps the client's orders with other orders and in his own name contracts in a single transaction with the selling jobber for the purchase of a larger number of shares than the client has instructed him or authorized him to buy. What follows from this assumption? This only,

as it appears to me: that; as the broker will have fulfilled his duty according to usage, the client cannot complain, and is bound to pay the broker his commission and indemnify him against such liabilities as the broker may necessarily or properly incur in the course and for the purpose of his employment. Surely, the usage in no way assists the plaintiffs' case here. The plaintiffs' case is not a case of a broker suing his client for indemnity in respect of shares bought for the client in a way which is sanctioned by the rules and usages of the Stock Exchange, *but it is the case of a seller seeking to have recourse against the principal of a broker who has contracted with the seller in his own name by a contract for the purchase of a larger number of shares than that which the client authorized, and which included a number which were being obtained by the broker for a different client. The usage cannot operate, in my judgment, so as to make a man liable upon a contract which is not, in point of law, his contract; it cannot create contractual rights between parties where none exist according to legal principle.* Indeed, the very meaning of the usage may, as it seems to me, be stated in language used by BLACKBURN, J., in his judgment in *Mollett* v. *Robinson*, in regard to the custom which was under discussion in that case—it is *'not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order.'* In my opinion no such contractual relation has existed between the plaintiffs and the defendant as is necessary to support this action, and therefore, I must give judgment for the defendant."

Applying that case to the one at bar, we have this result: If, eliminating all questions of substituted contracts, Schwartz, Dupee & Co. had received an order from Clews & Co. for the sale of 700 shares, and had filled it by making a contract of sale on August 3rd for 1,150

shares with Jamieson & Co.,—which is what the bill alleges—and Clews & Co., upon discovering the fact had tendered to Jamieson & Co. 700 shares on August 31st, and on their refusal to accept had sold the stock in accordance with the rules of the Exchange (instead of making a fictitious sale), they could not have maintained an action to recover the difference, because there was no contractional relation between them and Jamieson & Co.

We have, with what we fear may perhaps be unnecessary repetition, called the court's attention, in connection with different branches of the case, to the admitted fact that the original transactions made by the brokers on behalf of the petitioners remained in full force, notwithstanding the settlements and substitutions between the brokers themselves; and as a conclusion of this branch of our argument, we present the sharp contrast between the statement in the brief of counsel for petitioners, and the agreed statement of facts. In their brief counsel say, in summing up the effect of these transactions:

(Brief, p. 222.)

"When the contract of July 25th at 229 per share, through these daily novations and substitutions, had merged into the contract of August 3d at 222 per share, *all prior contracts had been cancelled and annulled.*"

(Trans., p. 78.)

"Those transactions, so far as the different principals are concerned, were not settled or cancelled by any of the substitutions, nor by any of the settlements between the brokers, except so far as where one client or principal of a broker, was through such broker both a purchaser and a seller.

In other words, the settlements by substitutions or otherwise through the clearing house, were merely settlements between the members of the stock exchange, and were not settlements or cancellations of the contracts between the principals whom the brokers represented and the brokers themselves, except where the same broker had both purchased and sold for the same client."

These admitted facts give added point to all that is said in *Beckhuson* v. *Hamblet, supra;* for here the original sale for 500 shares which the brokers *were* authorized to make continued in force as to the petitioners; and certainly the proposition that their liability could be affected by a contract which they had not authorized is lightly characterized as untenable.

II.

THE SALE MADE BY THE PETITIONERS WHILE THE STOCK EXCHANGE WAS CLOSED, FOR THE PURPOSE OF FIXING THE AMOUNT OF THEIR DAMAGES, WAS BOTH A VIOLATION OF THE RULES OF THE EXCHANGE AND AN ACT OF SUBSTANTIAL BAD FAITH TOWARD THE DEFENDANTS, EVEN IF A CONTRACT EXISTED BETWEEN THEM AND THE PETITIONERS.

We have called attention in the statement of the case to the rules of the Stock Exchange, which provide a method for closing out defaulted contracts, and for the ascertainment, by a sale, of the amount of damages resulting therefrom. It is conceded that the method provided by those rules was not followed, and, therefore, if those rules are obligatory as part of the contract upon which this suit is based, no right of recovery has been shown, even conceding that the transactions disclosed by the evidence created a contract in which Clews & Co. were sellers and Jamieson & Co. were purchasers.

With due respect to opposing counsel, we do not think they have apprehended our position on this branch of the case. These provisions of the rules in no respect resemble provisions sometimes inserted in contracts, the purpose of which is to erect a new tribunal and oust courts of their jurisdiction to entertain suits for the enforcement of the

contract, or the recovery of damages for its breach. They only provide what it is clearly competent for the parties to do—a method of ascertaining the damage occasioned by a default, by providing that certain things shall be done in such cases. It is plainly within the power of the parties to provide that in case the buyer does not receive the stock, the seller shall be obliged to do certain things, and to state definitely what he shall do in the way of ascertaining the market price, which would fix the extent of the buyer's liability. We therefore deem it entirely unnecessary to consider the rules of law discussed by opposing counsel as to the effect of contracts to submit disputed matters to arbitration or to oust courts of their ordinary jurisdiction.

It is practically conceded, and we suppose will be expressly so—that if the Stock Exchange had not closed, Clews & Co. could not have held Jamieson & Co. liable for the difference between the contract price and the price obtained by a sale not made in accordance with the rules of the Exchange. The question arises because of the fact that the Stock Exchange was temporarily closed.

The theory upon which this case is prosecuted necessarily admits that these rules form a part of the contract between the parties. Indeed, these rules would form a part of that contract and be binding upon Clews & Co. within the principles of the decisions to which we have referred, even if a practice such as petitioners rely upon would not bind them to a substituted contract, differing essentially from the terms of the one which they authorized, for these rules do not involve any change in the essential elements of the contract, but regulate only the method of procedure under it.

No question is raised as to the power of the governing committee to close the Stock Exchange. The reason for closing the Exchange was because of a great financial crisis, which so disturbed the ordinary conditions of the market that, if the Exchange had remained open, very serious catastrophe would have resulted, involving the ruin of many of its members. The governing committee therefore closed it, and the very purpose of that act was to prevent such sales as the one attempted to be made by the petitioners in this case, and to prevent the closing out of August contracts during a period of panic, and to allow the market to recover as far as possible its normal condition.

Applying the principle upon which petitioners rely, that parties contract with reference to the action of the Stock Exchange, it seems quite clear that they contracted with reference to the contingency of this power of temporarily closing the Exchange being exercised by the governing committee, and thus of having their rights to close out defaulted contracts by re-sale of the stock temporarily suspended. The rule on this subject provides that where a buyer (for instance) defaults on his contract, the seller shall, after giving notice, employ an officer of the board to close the contract in the Exchange by a sale, unless the price has been agreed upon by the contracting parties. If the seller does not exercise this right, then the rule provides that the price shall be fixed by the price current at the time that contract ought to have been closed under the rule.

Clews & Co. thus had two options—either to request an officer of the Board to make a sale, or to settle the contract upon the price current. It is an admitted fact that they did not request any officer of the Exchange to

make such a sale. Their excuse for this probably is that the Exchange was closed, but the duty of taking the first step was upon them. The officer would have no right to make the sale until he had been requested in writing to do so, even had the Exchange been open. As no definite time was fixed in the order of the governing committee for the closing of the Exchange, what would have happened had they made such a request of the proper officer is problematical. Certainly there is no reason for their utter failure to take that first essential step of requesting the officer to make the sale, merely because the Exchange was not open on August 31st. It is much more natural to presume that if such a request had been made, and the officers had thus seen that an important transaction required such action, arrangements might have been made for taking it.

But under the rule Clews & Co. were not *bound* to have the damages on the contract fixed by a sale made in this manner. Therefore, we can only conjecture whether, had the Exchange never been closed, they would have availed themselves of this privilege or not. They had the alternative of taking such affirmative action, or of submitting to the operation of the next clause of the rule, which provides that if they do not do so the price shall be fixed by the price current at the time the contract should have been closed under the rule. Whether their failure to take advantage of the first alternative was due to a good or bad reason, the fact remains the same, and would seem to bring into operation the second part of the rule.

The question arises, what is meant by the price current? It would seem to mean, and being a definite rule of the Stock Exchange clearly to refer to, the price current as fixed by sales on the Stock Exchange, or perhaps to the

daily settlement price fixed by the manager of the clearing house in accordance with its rules. The only other meaning that can be given to the phrase would be that it referred to the general market price. Whichever meaning is attached to it, it is the price current on the day when the contract ought to have been closed under the rule, which probably is an equivalent expression in this transaction for the day on which delivery should be made. How are we to determine what was the price current on the Exchange at that time? Counsel for petitioners assume that there was no price current, because the Exchange was closed. This assumption seems to us to have no reasonable basis. There obviously was a price current on August 3d, both as fixed by actual transactions and by the settlement price, and that price current is shown by the evidence in this case to have been $222 a share. Certainly, it is as reasonable to regard this as the price current on the Exchange—it being the last price settled before the delivery day—as to assume that there was no price current whatever. All presumptions of the law tend towards certainty and avoid uncertainty. The price current being fixed on one day, it certainly is reasonable to say that it devolves upon the party having the affirmative of the issue, and who is seeking a remedy, to show a change from the price thus established.

That the rules contemplated the possibility of the Exchange being closed on the last day of the month, is shown by Sec. 2 of Article 28 of the clearing house rules. It there provides that deliveries for the account shall be made on the last day of the month, but that where that day occurs on a holiday, "*or on a day when the Exchange is closed for business,*" then deliveries shall be made on the first business day preceding. The expression, "busi-

ness day," would seem clearly to refer to a day when the Exchange is open for business.

It may be that these rules do not provide with great certainty for the action of the members when the Exchange is closed for an unusually long period; but they show very clearly that deliveries are not to be made when the Exchange is closed for business, and that the liability of the defaulting party, if not fixed by a sale conducted by an officer of the Exchange, is to be fixed by the price current on the Exchange. If the price current is to be regarded as shown by the sales made on the last day when the Exchange was open, then no damages could be recoverable from Jamieson & Co., for that price was the same as the price at which they agreed to take the stock.

If, on the other hand, the price current on the day the contract matured is not to be fixed by the price on the last business day of the Exchange, then it must refer to the market value on that day. It certainly does not refer to the general market value as shown three weeks later, nor leave it within the control of the seller to enhance his damages by selling whenever he pleases.

There is no evidence in this case as to what the market value of the stock was on August 31st; therefore, if the market price on that day is the measure of the petitioners' rights, they have failed to show that they suffered any damage, and the bill was properly dismissed. Nor is there any evidence in the case of the value of the stock from August 31st to September 22d, nor any evidence of the value on the latter date, except such as is furnished by the transactions which the petitioners carried out on that day.

It is said, however, that when the Stock Exchange

opened in November, the settlement price of Diamond Match stock was below $130 a share, the price at which the fictitious sale was made; and, therefore, it is argued that Jamieson & Co. would not have been benefited if the petitioners had awaited the opening of the Stock Exchange, and closed the contract in accordance with its rules. The settlement price, it will be remembered, is an arbitrary one fixed at the close of the day's session as a basis for the adjustment of differences in the clearing house. (*Trans., p.* 108.) It always happens that actual sales are made on the floor at different prices, and the settlement price therefor does not show that sales at higher prices were not made. (Mr. Wilkins' testimony, *Trans., pp.* 108, 115.)

One of the reasons why members of a Stock Exchange are required to carry on their transactions on the floor of the Exchange, is because outside sales have an effect upon the market price, and yet are not carried on under the controlling influence of the Exchange itself. The very fact that a large block of this stock was offered at public sale outside the Exchange in this way would naturally have a tendency to affect the price when the Exchange opened. If it be said that this is a supposition, we answer this is no case for indulging presumptions in favor of the petitioners, as a means of sustaining their case.

If the contract required—as we contend it did—that a sale to fix the price should be made under the rules of the Exchange, and that the seller could not use as a means of fixing the buyer's liability, a sale made on the street, then Jamieson & Co. were entitled to stand upon the terms of their contract, and to have even the chance which

that contract provided for a lessening of their liability by a sale properly conducted.

And it is to be remembered that the petitioners did not even await the opening of the Stock Exchange before filing their bill. The bill was filed on September 25, 1898, three days after the fictitious sale was made. In any view, therefore, that can be taken of the matter, the commencement of the suit was premature.

If the seller was bound to make a sale through an officer of the Exchange, and was relieved from even requesting an officer to make such a sale until the Exchange was formally opened for business, then he had no right until that contingency occurred, to bring suit against the buyer.

If, on the other hand, the price current which should, in the absence of such a sale, fix the measure of the liability, was not to be determined by the price on the last day when the Exchange was open, then it would be the price on the next opening day.

Whichever view is taken, it leaves the petitioners in the attitude of bringing suit before the cause of action matured. This is not answered by saying that it did not injure the defendants. The question is not of injury to the defendants, but of the performance by the petitioners of a condition precedent to the exercise of the right to bring suit. They cannot enforce a contract, disregarding one of its terms, upon the theory that the performance of that condition would have been of no substantial benefit to the defendants. The defendants *were not bound to pay a[illegible] until the full maturity of the contract in accordance with its terms;* and whether waiting that period would compel them to pay a less or a greater sum is of no con-

cern to the petitioners, and does not hasten their right to bring suit.

The petitioners were advised that this defense was relied upon, for the rule upon which it is based was specifically set out in the answer filed by Jamieson & Co. They took their own construction of the contract, adopted their own method of carrying it out, and are in no position to ask anything more than the strictest interpretation of their contract would warrant.

The fictitious sale carried on by the petitioners bars them from relief.

If it be conceded that the petitioners had a right to fix the amount of their damages by a sale conducted upon proper notice, we still contend that the sale made in this case—so far from giving them a cause of action, destroyed their right to relief in equity.

This question does not involve the rules which counsel refer to, in cases in which a trustee, mortgagee, or other person selling the property, buys it in himself. In those cases counsel contend the sale is merely voidable, and the party whose rights were attempted to be cut off can sell, redeem or exercise his original rights.

The sale in this case was made as a means of fixing the market value of the stock, and of using the values as thus fixed as a basis for the claim against Jamieson & Co. The latter being abundantly solvent, it was to the interest of Clews & Co. to enhance their damages by a sale at a low figure. That a fictitious sale cannot be regarded by a court as fixing either market value, or as determining any similar question, is a proposition which we think can hardly be disputed. If it were, the drastic and severe rules of the Stock Exchange would them-

selves show how such sales are regarded by persons whose daily transactions depend upon market prices, which are fixed by purchases and sales.

Article 17 provides that no fictitious sales shall be made, and that members contravening this shall be suspended from the Exchange (*Trans., p. 13.*) And the rule with reference to sales on the Exchange on defaulted contracts, specifically provides that no party shall be permitted to supply offers to buy or sell securities closed for his account under the rule. (*Trans., pp. 33-4.*)

The sale made in this case was plainly a violation of these rules of the Stock Exchange, and of the principle upon which they are founded. The penalties imposed could not be exercised against Clews & Co., who were not members of the Exchange; but they certainly can acquire no right to fix the liability of Jamieson & Co. by claiming the benefit of one part of the rules and openly violating another part.

The sale in this case cannot fairly be characterized as anything more than a mere pretense. It was not a case of a mortgagee buying in the property and crediting a certain amount on his mortgage debt. There was, from the start, no intention of making an actual transfer of the property at all. Clews & Co. had provided in advance a nominal purchaser, and had authorized him to bid up as high as $135 a share. This would certainly seem to indicate, among other things, that $135, which was bid by Mr. Barber for a part of the stock, was a fair representation of its value. And if they had accepted the *bona fide* bid made by Mr. Barber for 200 shares at $135, and allowed their own fictitious purchaser to take in the rest at even the sum which he offered—$130, without going

to the limit of his instructions—it would have made a large money difference to Jamieson & Co. Or, if they had accepted the offer of $135 for 200 shares, and sold the other for $129, the settlement price on the day the Exchange opened, it would have made a difference of $500 in favor of Jamieson & Co.

But the sale had no actuality in it at all, nor was even the formality of handing the shares of stock to this prearranged purchaser observed. The stock did not belong to Clews & Co., and all they did was to agree with Swartz, Dupee & Co., who had it, that *if any outsider bought it,* Clews & Co. would replace it. No outsider did buy it, and therefore it never so much as left the hands of Schwartz, Dupee & Co.

This purpose was carried out by one who was interested in fixing a low price for the stock, and was doing this through a fictitious transaction, in order to create evidence to be used in court in a suit which was then contemplated against Jamieson & Co. And in the bill it was alleged as a genuine transaction, and an attempt made to prove it, until the calling of Mr. Gage as a witness compelled a disclosure of the real nature of the transaction. Does a complainant who thus seeks to impose upon both his adversary and the court enter a court of equity with clean hands?

The rule which denies relief to a complainant under such circumstances does not require that he should have been guilty of some positive fraud which would furnish the opposite party a right of action against him; it applies to those acts of bad faith and unfair dealing which are inconsistent with the stern casuistry of a court of equity,

and with the principles upon which it gives relief. Such is the case which is here presented.

1 Pomeroy's Eq. Jurisprudence, Sec. 397.

If all that we have said as to the terms of this contract and the right to have the damages determined by transactions on the Exchange be disregarded, still Jamieson & Co. were entitled to have their liability for damages fixed by a transaction which was not only a real one, but was carried out in good faith. And if the question as to the relation which these rules of the Stock Exchange have to the settlement of defaulted contracts is even a doubtful one, this but served to impose a greater obligation upon the petitioners to exercise good faith, and not to seek—as they did—to fix the rights of their buyers by a purely fictitious transaction.

III.

THE PETITIONERS CANNOT MAINTAIN A BILL IN EQUITY.

Conceding a contract to have been made between Clews & Co. and Jamieson & Co., and violated by the latter, is the remedy for the breach properly sought in equity?

The claim of the petitioners is, in its essence, merely a legal claim for the unliquidated damages resulting from a breach of contract. The right to enforce this claim in a court of equity is placed by counsel upon two grounds:

1. The existence of a trust fund in the hands of the Stock Exchange.

2. The absence of a legal remedy, because the contract was an entire one for 1,150 shares, in which Clews & Co. are interested only to the extent of 700 shares.

The mere existence of a trust fund furnished no reason for the bringing of a suit even against the trustee. There should be in addition some misapplication of it, either committed or threatened, or some refusal to apply it on proper request, to the purpose for which it was created. None of these elements are present in this case.

No suggestion is made, even in the bill, of an intention on the part of the Exchange to pay any part of the money to Jamieson & Co. or to misapply it in any way. There was not even a refusal to pay it to petitioners or to recognize their rights in it. All that is shown is that petitioners and Schwartz, Dupee & Co. on September 23d sent to Mr. Wilkins, the Secretary of the Stock Exchange, a letter demanding the fund and asserting an intention to apply it to their claim against Jamieson & Co. Not receiving any answer to this, they at once filed this bill on the 25th. At this time the Exchange was closed and the clearing house by which such payments were made had temporarily suspended operations. The fund was a security for the entire contract for 1,150 shares, and certainly it would not seem to be a violation of the trustee's duty to at least hold it long enough to consult the wishes and respect the rights of the other interested parties. The rule provides that such margins shall be held by the clearing house first for the protection of the members dealing through the clearing house with the member depositing the margin, and then held for ten days for the protection of other members of the Exchange. (*Trans.*, p. 127.) What the situation of Schwartz, Dupee & Co. was, or why this reasonable rule should not have been observed by the body which passed it, the petitioners did not think it necessary to show. There is certainly nothing in the evidence warranting the filing of a bill after a

lapse of one day after such a letter, or in taking what counsel call "the administration of the trust fund" out of the hands of the trustee.

Reliance is also placed by counsel upon the rules with reference to following trust funds. Those rules apply where the fund has been misapplied, or it was created by a wrongful act, as by the conversion of property. No theory of the facts in this case could furnish ground for the application of these rules.

It is constantly asserted by counsel that $7,000 of this fund was deposited by Clews & Co. Of this fact there is not the slightest evidence. The deposit, not of $7,000, but of $11,500, was made by Schwartz, Dupee & Co., and, as we have shown, it was to secure a contract to which petitioners were not parties. If petitioners furnished this money in any way or by any means, it would have been easy for them to show it. But the fact is that they did not. Counsel say they "must have" made a deposit upon the original contracts of July 25th and 27th. There is no evidence that they did even that; but if they did, that is the only deposit they ever made. The result of the clearing house transactions may have kept, and probably did keep, them indebted to Schwartz, Dupee & Co., but even that debt was not paid by them until after this suit was brought. There is a manifest difference between the mere balances, or debts between them and their brokers, and the creation by them of the specific fund deposited on August 3rd.

The other proposition on which equitable jurisdiction is based is that the contract is an entire one for 1,150 shares, and therefore a suit at law could not be brought upon it.

If Clews & Co. were parties to that contract, then the other client or clients of Schwartz, Dupee & Co., for whom the 450 shares were sold, were also parties, and entitled to enforce it. Their rights being thus joint, under an entire contract, there would seem to be no obstacle to a suit at law in their joint names. In reality counsel's proposition is that each of two joint sellers in a single contract of sale may maintain a bill to collect his share of the unliquidated damages caused by the buyer's default. This must sound strangely to the ear of both the equity and the common law pleader. If such a right exists, a reciprocal right must exist in the buyer, and he could therefore maintain a separate bill to collect from each seller his share of the damages.

But it is said that the Stock Exchange might have maintained a bill of interpleader, or Schwartz, Dupee & Co. might have filed a bill in their own names; and apparently from this hypothesis it is argued that the Circuit Court might have directed some of the defendants to file a cross-bill, even without their asking or even wishing to do so. We had supposed that the question was as to the right of the petitioners to maintain this bill, not as to the right of some one, who does not care to do so, to maintain some other kind of a bill. And we had not supposed that where a complainant had no right to sue, one of the defendants could better his case for him by filing a cross-bill. Schwartz, Dupee & Co. could not maintain a bill, for they admittedly have no claim. Neither they nor the Exchange have ever shown the slightest intention of bringing suit. This court sits to review the decree of the lower courts. Is it error for a court to dismiss a bill filed by a complainant without right because some one else might have maintained a suit if he had wished to bring it?

IV.

THE QUESTION OF THE LEGALITY OF THE CONTRACT DECIDED BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals decided this case upon the question of the legality of the contract, basing its decision solely upon the petitioner's own theory of the contract as shown in their evidence and as stated by their counsel in their briefs. Our clients did not raise that question, but based their defense upon the propositions which we have argued in this brief. A somewhat anomalous situation is now presented by the manner in which this question is brought before this court. Counsel for the Stock Exchange—who filed no brief in the Court of Appeals—have taken up the question here for the sole purpose of securing from this court a decision overruling the opinion of the Court of Appeals upon this point. The Exchange has, and professes to have, no concern whatever in the outcome of the case, in the judgment which the court shall pronounce, but only in the reasons which the court shall give for its judgment. And this interest is not limited to procuring an opinion in which the court leaves this question undecided, but one which expressly overrules the decision of the Court of Appeals, so that the Exchange will have a judicial precedent for use in other transactions sustaining the view which it thinks will best subserve its interests.

Clews & Co., on the other hand, are not interested in the question as an academic one, or for their guidance in other contracts, but for the practical financial interest which it has for them in the case in hand. They and the Stock Exchange—as petitioners and respondents—there-

fore united their efforts to procure the *certiorari* from this court, and in seeking its opinion upon this question.

Our clients Jamieson & Co., being members of the Stock Exchange, are interested in maintaining that contracts effected through it, and under its rules, do not contain those elements which, under the decisions of the courts (like that in *Dickson's Exr.* v. *Thomas*, 97 Penn. St., 278), would make them illegal *per se*. The only elements upon which this decision of illegality was based, were those which the petitioners brought into the case in endeavoring to formulate and to prove their theory of the contract, and of the meaning and intent of the usages of the Exchange. We therefore point out to the court, as a sort of summing up of our propositions, that our position, and that of our clients, maintains the legality of the transactions on the Exchange. And one reason why we do this is because we believe that if any of the positions which we have taken as to the construction of these contracts, and the rules of the Exchange is doubtful, the construction will be adopted which maintains their legality, rather than that which even suggests the contrary.

The petitioners contend that the original contract of sale as authorized by them and as made for them, provided—and therefore that both parties to it intended—that it could be altered each day, or even canceled, upon the payment of the difference between the contract price and the settling price on the day the change was made; that it could be settled in this way by a new contract at either a higher or a lower price, in one case the seller paying and in the other receiving the difference. And this was to be done when the petitioners had no stock on hand, but had sold "short" and would therefore have to buy it if they were to fulfill the sale by a delivery.

We contend that the petitioners' contract of sale bound them to deliver, and the buying broker and his principal to accept, the stock at the contract price; that this contract was not canceled or settled by payment of differences, so far as petitioners were concerned, nor did they intend that it should be; that it continued in force, and the only settlement or change was between the members of the Exchange, leaving the rights and liabilities of petitioners unaffected. The validity of that contract, as affected by an intention of the parties to it differing from its apparent form, does not concern Jamieson & Co.; for they were not the buyers in it.

Petitioners contend that by their original order to Schwartz, Dupee & Co., they intended to and did confer on them authority to merge the contract with the contracts of other customers, and other members of the Exchange and to make them parties to the contractual result, no matter how much it changed the original contract, and even though the substituted contract made the brokers buyers instead of sellers, upon receiving or paying the difference between the original sale price and the shifting prices on the days when the changes were made.

We contend that the petitioners did not become parties to these substituted contracts, or authorize the brokers to so bind them; that these settlements were only between the brokers, and did not enlarge or diminish the contract rights of their principals; and that so far as appears from the terms of the contract which petitioners authorized, it did not contemplate any such settlement of its apparent obligation to deliver the actual stock on August 31st as their construction would suggest.

This case is here for a review of the decree of the

lower court, not for the mere settling of legal propositions. Unless the petitioners sustained by a preponderance of evidence the allegations of their bill that they had made a contract with Jamieson & Co. which the latter had broken under such circumstances as to create an equitable right, and that they themselves have fulfilled all the requirements of the contract, then the decree of dismissal was right, whether a good or a bad reason was given for its entry.

Respectfully submitted.

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